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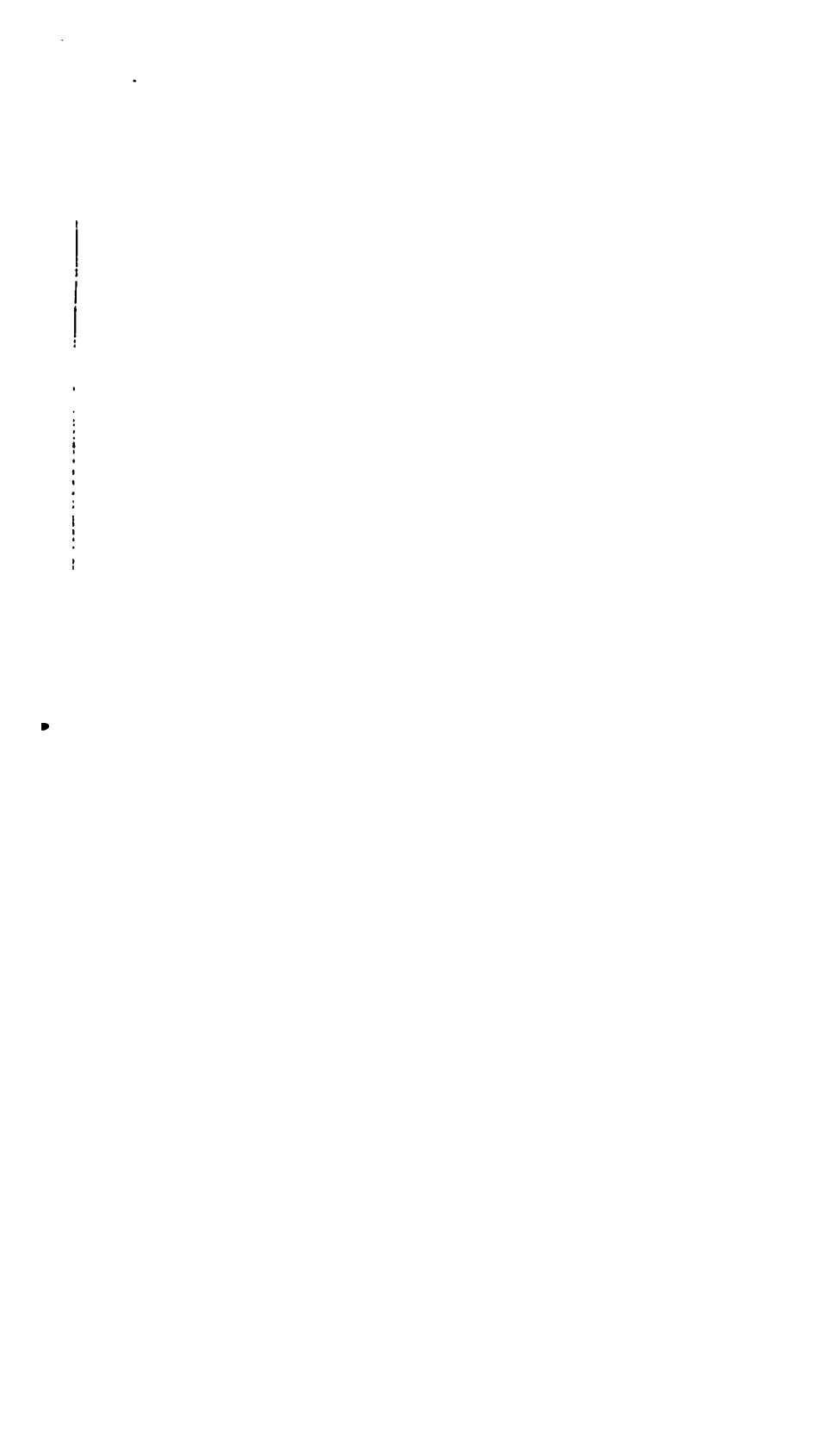
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THE  
**AMERICAN STATE REPORTS,**

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN  
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

**COURTS OF LAST RESORT**

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,

(BY THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS").

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**AMERICAN STATE REPORTS.**  
**VOL XXVIII**



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WASHINGTON.**

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**HURD v. BRISNER.**

[3 WASHINGTON, 1.]

**TAX DEED — PRESUMPTION OF REGULARITY — BURDEN OF PROOF.** — Where the statute makes a tax deed presumptive evidence of the regularity of all prior proceedings, the burden of showing irregularities is upon the owner, in an action by the holder of the deed for the possession and to quiet title; but when it is shown that the original assessment roll upon which such deed is based is not in the office of its proper custodian, such presumption is overthrown, and the burden of proof shifts to the holder of the deed to explain the absence of the assessment roll.

**TAX DEED.** — **STATUTE OF LIMITATIONS** cannot be invoked by the holder of a void tax deed.

**ACTION** by the grantor of a purchaser at tax sale to obtain possession of and quiet title to certain lots in the city of Seattle. Judgment for the defendant, and plaintiff appealed.

*Ronald and Piles*, for the appellant.

*Stott, Boise, and Stott, and Crockett, Brown, and Fortson*, for the respondents.

**DUNBAR, J.** The judgment in this action was based on the following facts found by the court: 1. That the original assessment roll for the year 1875 is not in the office of the county auditor of King County, and there is no testimony offered to explain the absence of said original assessment roll; 2. That there is no record or evidence showing that the sheriff demanded payment of the persons chargeable in the transcript certified to him by the county auditor.

At common law, the burden of proof, as between the owner and purchaser, is upon the tax purchaser to show that all the



provisions of the law in relation to the proceedings on which his claim is based have been strictly complied with. He must give some evidence, the best he can, of every fact the existence of which is necessary to establish his right. The recitals in the deed are no evidence at all of the truth of what is recited. It is the duty of the purchaser to secure and preserve the evidence of his rights, and he cannot complain of losing them if he neglect so clear a precaution: Blackwell on Tax Titles, sec. 1120. To what extent the presumptions of the common law have been changed by our statutes is the main question here. Section 40 of the laws of 1871, page 48, which was in force at the date of this sale, provides that a tax deed shall be presumptive evidence of the regularity of all former proceedings. Thus it will be seen that the burden of showing the irregularities are shifted to the owner. In this case the court finds, and the finding seems to be warranted by the testimony, that the original assessment roll on which this identical tax was based was not in the office of the county auditor of the county in which the land taxed is situated. The validity of the tax depends upon the assessment, and the assessment can only be shown by the assessment roll; it is upon this roll that the county commissioners based their calculations in levying the tax: Laws 1869, p. 184, secs. 25, 26.

The auditor is the proper custodian of the assessment roll, and when it appears that the original assessment roll is not in the auditor's office, in our judgment the presumption of the regularity is overthrown, and the burden devolves upon the purchaser to explain its absence.

In speaking of this kind of a case under a statute similar to ours, Mr. Black, in his work on tax titles, section 254, says: "If he shall succeed in making out a *prima facie* case against the tax title, he will have shifted the burden of proof in respect to the points so singled out for attack back to the purchaser. . . . 'The evidence of irregularity must be such as to require explanation or counter-proof, and must be of matters which are peremptory and not directory, and that it is not sufficient to cast a general doubt over the title, but that it is necessary to point out some specific defect or raise a reasonable presumption against the sufficiency of some particular act, or of the non-performance of some necessary duty.'"

It is not disputed that the making of the assessment roll is a peremptory duty under the law. It is the initial step, the foundation of the whole system of taxation under our statutes:

See chapter 3, Laws 1871, p. 40, on the manner of making assessments. If this roll is not found in the office of the person charged with its custody, it is sufficient evidence of irregularity to require an explanation. If it has ever been there and is gone, there must be some explanation that can be given for its absence. In the absence of such explanation, the presumption must be that it was never there. On any other theory it would be impossible to make any defense against an irregularity of this kind. In support of this view, we cite *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Cass v. Dean*, 16 Mich. 12; *State Auditor v. Jackson Co.*, 65 Ala. 142; and many other cases.

In fact, we are unable to find an authority holding to the contrary, where the irregularity shown was a fundamental requisition, and not merely some directory proceeding, excepting possibly *Sams v. King*, 18 Fla. 557, where it is held that it is not sufficient to prove facts from which irregularities may be inferred. In addition to this, it is said (Black on Tax Titles, sec. 254) that notwithstanding the fact that there may be a statute making a tax deed presumptive evidence of the regularity of the proceeding, if the holder of such a deed goes into proof of the steps necessary to make the same valid, he will be deemed to have waived the benefit of the presumption in favor of the deed.

Many propositions are urged, and authorities cited in their support, by appellant which are readily conceded by the court, and which do not affect, in our judgment, the true issues involved in this case. Sections 2936 and 2937 of the code are not in point, as they were not in force at the time of the sale, even conceding the constitutionality of the latter section.

If the sale was void, which we think it was, none of the claims made by the appellant under the statute of limitations are good. Without analyzing the deed in question, or entering into any discussion, as so many courts are inclined to do, on the policy of the laws regulating tax titles and the difficulties of obtaining such titles, but construing the law in harmony with the great weight of authority, we find no error of the court below.

Judgment is affirmed.

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**TAX DEEDS AS EVIDENCE OF TITLE.** — The original rule was, that a purchaser at a tax sale "bought at his peril, and could not sustain his title, without showing the authority of the collector, and the regularity of the proceedings": *Lyons v. Hunt*, 11 Ala. 295; 46 Am. Dec. 216; *Keane v. Cannonau*,

21 Cal. 291; 82 Am. Dec. 738. The statutes which have made tax deeds *prima facie* evidence of all proceedings up to their date have shifted the burden of proof to the person assailing the title: *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524; *Long v. Burnett*, 13 Iowa, 28; 81 Am. Dec. 420; *Washington v. Hoop*, 43 Kan. 324; 19 Am. St. Rep. 141. A tax deed, to have this effect, must be regular on its face: *Taylor v. Winona etc. R. R. Co.*, 45 Minn. 67. If void on its face it cannot be received in evidence for any purpose: *Merriam v. Dorey*, 25 Neb. 618; as, for example, where it has apparently been altered in a material respect after its execution: *Miller v. Luco*, 80 Cal. 257. The Political Code of California provided that after a sale of property for taxes a certificate should be issued by the officer making the sale, and should state certain facts designated in the statute; that after the time for redemption expired, a deed should be issued which should state the matters recited in the certificate, and that when such deed was duly acknowledged or proved, it should be *prima facie* evidence of the assessment, equalization, levy, and non-payment of the tax, and that at a proper time and place, the property was sold as prescribed by law, and that it had not been redeemed, and that the person who executed the deed was the proper officer to execute it, and that such deed should, except as against actual fraud, be "conclusive evidence of the regularity of all other proceedings, from the assessment by the assessor inclusive up to the execution of the deed": Pol. Code of Cal., secs. 3776, 3786, 3787. Subsequently another section of the code relating to the time for redemption was amended, by requiring the purchaser to give a notice of the expiration of such time and of the time when he would apply for a deed, and the right to redeem was extended until such notice was given and the deed applied for. After this a conveyance was made pursuant to a tax sale, containing all the recitals required by the statute, and the question arose whether the deed was either *prima facie* or conclusive evidence that the notice of the expiration of the time for redemption had been given as required by law. The opinion of the court was, that this amendment modified the other sections, in so far as the subject-matter of the amendment was concerned, and made it necessary for the person relying upon the deed to show by extrinsic evidence that he had given the notice of the expiration of the time for redemption, and had thereby conferred upon the officer authority to execute such deed, and that in the absence of such extrinsic evidence, the deed was neither conclusive nor *prima facie* evidence of title: *Miller v. Miller*, Sup. Ct. Cal., Oct. 1892.

**TAX DEED AS COLOR OF TITLE.** — A tax deed properly recorded cannot, after the claimant under it has been in possession of the land for the statutory period, be overthrown by evidence not contained within or on the face of the deed: *Edwards v. Sims*, 40 Kan. 235. A tax deed, void on its face, does not set in motion the statute of limitations specially applicable to tax sales: *Kinney v. Forsythe*, 96 Mo. 414; but under the general statute of limitations, a void tax deed may constitute color of title: *Bartlett v. Kauder*, 97 Mo. 356; but see note to *Wofford v. McKinna*, 76 Am. Dec. 57.

**PAROL EVIDENCE TO PROVE CONTENTS OF TAX DEED.** — Certificate of tax sale has the *prima facie* effect given it by statute, even when, because of its loss or destruction, its contents are proved by parol: *Mitchell v. McFarland*, 47 Minn. 535.

**THE CONSTITUTIONALITY OF STATUTES** declaring in what cases a tax deed shall be conclusive or presumptive evidence of prior proceedings is upheld in *People v. Turner*, 117 N. Y. 227; 15 Am. St. Rep. 498; *In re Douglas*, 41 La. Ann. 765; *Rollins v. Wright*, 93 Cal. 395. But a statute is unconstitutional

which dispenses with the requirements essential to a valid exercise of the taxing power: *In re Douglas*, 41 La. Ann. 765; nor can a tax deed be declared by statute to be conclusive as to matters essential to jurisdiction: *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182.

STATUTE MAKING TAX DEEDS PRIMA FACIE EVIDENCE of transfer of title can apply only to deeds executed upon a sale for taxes levied after its enactment: *Keane v. Cassoway*, 21 Cal. 291; 82 Am. Dec. 738.

TO THROW THE BURDEN OF PROOF upon the holder of the title under the tax deed, the adverse party must point out some specific defect, or raise a reasonable presumption against the sufficiency of some specific act, or of the non-performance of some necessary duty: *Lacey v. Davis*, 4 Mich. 140; 66 Am. Dec. 524.

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## KENTZLER v. KENTZLER.

[3 WASHINGTON, 188.]

JUDGMENT OF SISTER STATE — EVIDENCE OF. — Mere loss of a certified copy of a judgment of a sister state will not warrant the admission of parol evidence of its nature and contents, in the absence of proof that the original record is lost or destroyed.

HABEAS CORPUS — CUSTODY OF MINOR CHILDREN. — In *habeas corpus* by a mother against a father to recover the possession of their minor children, claimed to have been awarded to the custody of the mother in divorce proceedings in another state, evidence that the mother is unsuited to have control of them, because of her immorality and her financial inability to support them, and that the father is a more suitable person to have the custody of them, and better able financially to care for, rear, and educate them, is sufficient to support a decree awarding the custody of such children to their father.

*Andrew F. Burleigh*, for the appellant.

*John Fairfield and John W. Kolb*, for the respondent.

SCOTT, J. This proceeding was instituted in the superior court of King County, this state, by the respondent, Millie Kentzler, who, in August, 1890, filed against the appellant, Joseph Kentzler, her petition for a writ of *habeas corpus* to obtain possession of two minor children. The parties had been married at Miles City, Montana, on the tenth day of July, 1883. The aforesaid Millie Kentzler claimed, and grounded her petition upon that claim, to have obtained a decree of divorce from said Joseph Kentzler in the courts of Montana, at Helena, on the twenty-seventh day of December, 1889, and that by said decree the custody of the children of the marriage had been awarded to her, and that the appellant had wrongfully kidnaped and carried away two of the children. The appellant, in answer, denied all knowledge of any divorce having been obtained, ex-

cept as he had been informed by Millie Kentzler herself; alleged that he had received no notice of the pendency of any such proceeding, and had not been present at the trial, either in person or by his attorney, and claimed that the respondent was unable to and did not provide for the support of the children, but that she herself was an object of charity, while he was fully able and ready to provide for them; and closed with charging respondent, and her mother, who were living together when he took the children away, with being loose in their morals, and totally unfitted to have the care and rearing of children.

On these issues the parties went to trial. The only evidence offered was the testimony of the respective parties, and some letters written by the respondent to the appellant. In the course of the respondent's testimony, she testified that she had lost the certified copy of the decree of divorce, which she had obtained, and after diligent search had been unable to find it. On this basis parol evidence was offered to prove the decree. Counsel for the appellant objected to the admission of such testimony as being incompetent, and that the only evidence admissible to prove such judgment was a certified copy of the record. The court overruled this objection, and in overruling it said: "I shall admit the evidence, and I will allow the defense to offer evidence showing what is best for the present welfare of the children, and I will allow evidence to be offered independent of the record of the Montana court."

Whereupon counsel for respondent objected to the introduction of any evidence other than that which related to the record of the Montana court, which was also overruled. He now claims that the court was justified in awarding the children to the custody of the respondent upon the testimony introduced as to the fitness of the parties. It seems, however, that the finding was not based upon this testimony, from what the court said, which appears in the statement of facts, and is as follows:—

"The Court: There are two facts in this case which seem to me to be established without doubt; one is, that the petitioner, Mrs. Kentzler, was divorced from Joseph Kentzler in Montana, in December last, and awarded the custody of the children; the other, that Joseph Kentzler went to Montana and took these children away from their mother without any right, and brought them to Washington. Upon all the other points there is a direct conflict of testimony, and I am unable

to tell which one to believe; I therefore order that these children, Charles and Laura Kentzler, be returned to the custody of their mother, Millie Kentzler. This case should be determined in Montana."

The objection made to the proof offered of the judgment of the Montana court ought to have been sustained. There was no claim or showing that the record itself was lost or destroyed, so that a certified copy thereof could not be obtained, and under such circumstances the mere loss of the certified copy which the respondent had obtained would not warrant the admission of the proof introduced. Section 905 of the Revised Statutes has provided a way in which judgments rendered by courts of record in one state may be proved in another. Section 430 of our 1881 code has dispensed with the requirement that the judge shall certify the attestation to be in due form, but it does not provide for proof in any other manner than by a certified copy. In the absence of a statute, an existing record of a judgment of a court of record of another state could only be proved by the production of the record itself, or by a copy properly authenticated: See 1 Greenl. Ev., 14th ed., secs. 501, 505. This is the rule also as to the proof of judgments of inferior courts where the course is to record them, and this will be presumed until the contrary is shown; the record or an authenticated copy is the only competent evidence: Sec. 513; *Owings v. Hull*, 9 Pet. 607; *Freeman on Judgments*, sec. 577.

But it appears from the testimony introduced relating to the fitness of the respective parties as to having the care and custody of the children, that the appellant is the more suitable person therefor. The children being only four and six years of age, respectively, when this proceeding was commenced, are too young to be given any voice in the matter. The foundation of the respondent's case in this particular was the cruel treatment of herself by the appellant, which she testified to and which he disputed. Her testimony showed that she had no property with which to support herself or the children, or any other means of support than by her personal labor, and that she could not earn to exceed fifteen dollars a month in that way; that she had applied to the appellant at various times after obtaining the divorce for money, and that he had sent her some. Several letters were introduced in evidence by the appellant, which the respondent admitted in her testimony that she wrote to him during this time, which weakened

her case very much. From these and her testimony it appeared that she was very needy and in poor health, and that she had been assisted by a charitable institution, at least upon one occasion while she had the children. Also, that the chairman of the board of county commissioners furnished her with a ticket to Seattle, and gave her some money. It appeared that she and her mother lived together a part of the time, and her own testimony and these letters went far to show that they were both unsuited morally to have the control of the children. She did not attempt seriously to maintain that the appellant was cruel in his treatment of the children, and she testified that he had always been a hard-working, industrious man, and that he neither drank nor gambled. His testimony, which was undisputed in this particular, showed that he was earning about one hundred dollars a month; that he was able to take care of the children and to give them a suitable education, and that he desired to have them. Their welfare is the only thing to be considered in this matter, and we think from the proof that they would be much better off under his control.

Reversing the judgment of the lower court, we remand the case, and direct that the children be given to the custody of the appellant; neither party to recover costs.

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**SECONDARY EVIDENCE.** — The rule that before secondary evidence of the contents of a written document can be received it is necessary to show its genuineness and existence, that it is lost, destroyed, without the jurisdiction of the court, or in the possession of the adverse party, who refuses to produce it, and that the party himself used diligence to procure it (*Wiseman v. North Pacific R. R. Co.*, 20 Or. 425; 23 Am. St. Rep. 135, and note; *Marriner v. Dennison*, 78 Cal. 203; *Silva v. Rankin*, 80 Ga. 79; *Deers etc. Co. v. Bagley*, 80 Iowa, 197; *Van Fleet v. Stout*, 44 Kan. 523; *Keller v. Amos*, 31 Neb. 433; *Barnby v. Plummer*, 29 Neb. 64; *Watson v. Rood*, 30 Neb. 264; *Gillis v. Wilmington etc. R. R. Co.*, 108 N. C. 441; *Bowick v. Miller*, 21 Or. 25; *Missouri P. R'y Co. v. Johnson*, 72 Tex. 95; *Lasater v. Van Hook*, 77 Tex. 650; *McBride v. Willis*, 82 Tex. 141; *Hunter v. Lanius*, 82 Tex. 677; *Smith v. Traders' Nat. Bank*, 82 Tex. 368), applies to records of judicial proceedings: *Mooney v. Holcomb*, 15 Or. 639; *McKesson v. Smart*, 108 N. C. 17; *Roach v. Privett*, 90 Ala. 391; 24 Am. St. Rep. 819, and note; as well as to transcripts of foreign judicial records: *Tanner etc. Co. v. Hall*, 86 Ala. 305.

**PARENT AND CHILD — CUSTODY OF MINORS.** — As to the conflicting rights of a father and mother to the custody of their minor children, see note to *Brooke v. Logan*, 2 Am. St. Rep. 183-187.

## LEWIS v. LIGHTY.

[3 WASHINGTON, 212.]

**VENDOR AND VENDEE — QUIETING TITLE — PARTIAL.** — A complaint in an action to quiet title, alleging that a certain decedent, whose wife had previously died, was at the time of his death the owner of one tract of land and had a homestead claim on another; that by his will he directed that the homestead title be perfected, and that all of his land should be sold when it would realize six thousand dollars, the proceeds to be divided equally amongst his minor children; that the executor named filed an inventory of the estate, including the homestead claim; that the guardian appointed for the minor heirs obtained a certificate of entry for the homestead; that thereafter the executor, under order of court, sold and conveyed all the land named in the inventory to plaintiff for \$6,050, the sale and conveyance being duly confirmed by the court; that thereafter two of said children, having become of age, conveyed their interest in all the land to plaintiff; that thereafter the guardian of the remaining children conveyed whatever interest they might have in the land to plaintiff under order of court; that said children received and retained their several portions of the purchase-money on becoming of age, and never asserted any claim to any of the land; that thereafter said children executed a quitclaim deed of their interest in the homestead tract to a third party, — states a cause of action as against the quitclaim grantees only, and should be dismissed on demurrer as against such children made parties defendant, but who are estopped to claim any interest in the land by the deed made by the executor. Under the facts of such complaint, judgment should be rendered in favor of plaintiff as against the quitclaim grantees.

**WILLS — CONSTRUCTION — HOMESTEAD — ELECTION BY HEIRS — ESTOPPEL.** — When a testator by his will directed that his homestead claim to land be perfected, and that all of his real estate be sold when it would realize a certain sum, the proceeds to be equally divided among his children, it will be presumed that he did not attempt to dispose of the homestead claim by his will, and his children were not required to make any election, but could have claimed the homestead as his heirs, and also shared in the estate under the will. As the executor named included the homestead in the inventory of the estate, and sold and conveyed it with the rest of the testator's land under order of court which was confirmed, and the purchaser thereafter obtained a quitclaim deed thereto from the testator's children who had come of age, and from the guardian of his minor children, after which such children, on coming of age, received and retained their respective portions of the purchase-money received at the executor's sale, they are estopped from denying that their title to any of the land, including the homestead, passed by the executor's deed.

*Frank H. Rudkin and Galusha Parsons, for the appellants.*

*Reavis and Milroy, and Whitson and Parker, for the respondents.*

**STILES, J.** The demurrer of the defendant Lighty to the amended complaint, for want of sufficient facts, having been



overruled, and he declining to plead further, a decree was entered for the plaintiff. The other defendants seem to have appeared by demurrer to the original complaint, but the record shows no plea by them to the amended complaint; and we can only presume, therefore, that they did so plead, as the decree includes all the defendants, and all appeal therefrom.

The complaint shows the following facts: Before his death, August 7, 1874, Walter P. Mabry was the owner of a certain 157 acres of land in Yakima County, which we will designate as "tract 1," and being a man of family, on the fourteenth day of November, 1871, filed and settled upon a certain other 160 acres of government land in said county, which we shall call "tract 2," as a homestead. His wife died between the time of his settlement on tract 2 and the time of his own death. He complied with the homestead laws up to the time of his death; and he left surviving him six children, viz., Emma F., who had passed her majority when her father died; James A., aged fifteen; Charles A., aged eleven; Mary A., aged nine; Henry W., aged seven; and Clara C., aged four years. Mary A. intermarried with the defendant Daniel W. Simmons before the action was commenced. Mabry left a will which named George S. Taylor as executor, and directed that the title to the homestead be perfected; that all of decedent's real estate in Yakima County be sold at such time as the same would realize the sum of six thousand dollars; that the proceeds of all his property, both real and personal, be equally divided among his said children, except that James should have fifty dollars extra; that each of the minor children should be maintained and educated out of his or her individual portion of the estate; that the executor provide suitable homes for the minors; and that each of the children should, on arriving at the age of maturity, receive his or her due proportion of the estate. Taylor qualified as executor, after due probate of the will, and on September 19, 1874, filed his inventory of the property of Mabry, in which he listed and described both of the above-mentioned tracts of land.

On the twenty-first day of August, 1874, Thomas B. Nelson was duly appointed guardian of the minor children of Mabry, they continuing to reside in Yakima County, and he acted as their guardian until each child attained majority, receiving the cost and expense of their care and education, from time to time, from the executor, out of the proceeds of the estate. On May 22, 1880, Nelson made the necessary proofs under the

homestead laws, and received from the United States a certificate of entry for tract 2. The executor took possession of both said tracts of land, and had the rents and profits thereof until the sale hereinafter mentioned. At this point we quote from the amended complaint as follows: "That on November 20, 1882, the said executor, having been offered for all the said lands aforesaid of the decedent situated in Yakima County, Washington Territory, to wit (both said tracts), filed his petition in said court for the sale of said lands, in accordance with the provisions of the will of the decedent, and on the twenty-ninth day of November, 1882, the said court duly made and entered an order authorizing and empowering the said executor to sell at public sale, to the highest and best bidder, all of said real estate aforesaid belonging to the estate of decedent, provided that the same be sold for not less than \$6,000; that in pursuance of such order, the said executor did, after notice thereof, duly given as provided by law, on December 26, 1882, sell said lands aforesaid at public auction to the highest bidder therefor, and Thomas Clancy having bid therefor the sum of \$6,050, the same was struck off and sold to him for the said sum; \$2,000 of which sum, as required by said order, was paid by said Clancy in cash; that on January 8, 1883, the said executor filed his return and report of said sale in said court, and the said sale and all proceedings thereunder were, in all things, by said court duly confirmed, and a deed ordered made accordingly, and on March 10, 1883, the purchase price all being paid, said executor duly executed and delivered to said purchaser a deed for the said lands, and every parcel thereof, which deed was filed in the auditor's office for record in Yakima County, and said purchase price, to wit, \$6,050, was charged to said executor as funds in his hands belonging to said estate, to be distributed in accordance with the terms of said will; that after the sale of said lands to said Thomas Clancy, to wit, on February 15, 1883, said Clancy, for value, sold and conveyed the same to plaintiff and M. V. B. Stacy, and on March 17, 1883, for further assurance of such title to said vendees of Clancy, James Mabry and Emma F. Nelson, both being of the age of majority, and both having filed their consent in writing to such sale by said executor, executed and delivered to plaintiff and said Stacy a deed conveying to them said lands aforesaid, and all their interest therein; that on March 26, 1883, the said Thomas B. Nelson, guardian of the persons and property of said minors, for further assurance

of title to said lands to plaintiff and M. V. B. Stacy, filed his petition in said probate court for leave to sell and convey whatever interest his said wards might have in said lands, and the said court then duly made an order authorizing and directing that said guardian make and execute such conveyance, which conveyance was made on May 8, 1883, whereby said guardian executed and delivered to said plaintiff and said Stacy a conveyance of all the right, title, and interest of his said wards, Mary A., Henry, Charles A., and Clara C. Mabry, in and to all of said lands."

Stacy and plaintiff, immediately after their purchase from Clancy, went into possession of both tracts of land, and so remained until February 19, 1884, when Stacy conveyed his interest to plaintiff, who has ever since been in possession, claiming title under his deeds, making improvements, paying taxes, etc. The Mabry heirs never asserted any claim to either tract. In 1889 the plaintiff complied with some technical requirements of the land-office, and thereupon a patent was issued for tract 2. The executor received and accounted for the proceeds of the land sold to Clancy, and after May 1, 1884, had no other funds in his hands, and the complaint charges that the Mabrys "well knew of said sale of said lands by said executor, and that such purchase-money was held by said executor, to be distributed under the provisions of said will, and with full knowledge of such facts, and of all the matters herein set forth, the said several defendants, on their arrival at the age of majority, have each received and receipted for the several portions of such purchase-money for said lands due them in accordance with the terms of and under the provisions of the said will, and have retained and used the same." The sums paid to each, with the dates of payment, were stated in full. The final allegations of the complaint are, that about May 17, 1889, the defendant Saylor, for the purpose of injuring and defrauding plaintiff, and of casting a cloud upon his title to tract 2, represented to Clara C., Mary A., Charles A., and Henry W. Mabry that he could and would recover said tract 2 from plaintiff if they would execute quitclaim deeds to him for all their interest therein; that they disclaimed any and all interest therein; but that Saylor agreed that he would pay each of them twenty-five dollars for such quitclaim deeds, and would, in addition, pay to them a share and portion of whatever he should recover of said land; that being thereby induced by said Saylor, they

executed and delivered quitclaim deeds for their interest in said land, which at his instance were made to the defendant Lichty, who is not a resident of this state, and that these deeds have been recorded in the auditor's office. Saylor, after the delivery of the quitclaim deeds, procured the patent for tract 2 from the land-office, and now has possession of it. The plaintiff concludes that neither Lichty nor Saylor have any interest in tract 2, and that the quitclaim deeds are a cloud upon his title, and prays that the deeds be set aside and taken for naught; that Saylor be required to surrender the patent; that the cloud be removed; and that he be decreed to be the owner of tract 2 in fee-simple.

The court below found that the defendants Mabry, after attaining majority, elected to take under the provisions of the will of their father, instead of as his heirs, and ratified the sale made by the executor with full knowledge of the facts; and it decreed all things in accordance with the prayer of the complaint, as well as that the defendants, and each of them, should be enjoined from the assertion of any estate or interests in both tracts. The costs were charged to the defendants, and each of them.

It seems to us that no cause of action was stated against any of the defendants except Lichty. Simmons was merely the husband of one of the Mabry heirs, and could not, by any possibility, have or claim any interest in this land. Saylor somehow got hold of the patent, which, presumably, contained the names of Mabry's minor children as grantees, but to obtain it from him a personal action at law was all that was necessary. So far as the quitclaim deeds were concerned, he is a stranger to them, for Lichty is the grantee, and there were no allegations that Lichty was in any way a trustee for Saylor. It is stated that Saylor and Lichty "now openly claim an interest in said lands aforesaid, under said quitclaim deeds"; but however Saylor might "claim," unless he claimed that Lichty held this title to some extent as trustee for him, he could not be a proper or necessary party in a case where, as here, the whole attack is made upon the obnoxious deed. As to the defendants Mabry and Mrs. Simmons (*née* Mabry), it appears by positive allegation that they claimed nothing as against the plaintiff, even when executing their deeds for twenty-five dollars each, and surely after they had delivered their deeds they were divested of all further possible reason for asserting any interest, and it is not shown that they did or

do assert any. It is plain that whatever matters there were for controversy over tract 2 were all transferred to Lichty by his deeds, and a decree against him would settle the title just as effectually as though all the country were made defendants. Inasmuch as Lichty demurred separately to the amended complaint, it will be presumed that the others did likewise, or omitted to plead and were defaulted. They are entitled to a reversal of the decree against them, and to a dismissal of the action, with their costs. Neither should the decree in any event cover tract 1, as the title to it was nowhere put in issue.

The appellants maintain, upon the principal issue, that all of the proceedings of the probate court resulting in the deed of the executor and the guardian for tract 2 to Clancy were absolutely void, because Walter P. Mabry died before his right to patent had matured, and he leaving no wife, under section 2292 of the Revised Statutes of the United States, the "right and fee" to the patent and the land inured to his minor children instantly and without power of devise in him. It will be observed that if the interpretation proposed by the appellants for the above-mentioned statute is sustained, it would follow that the executor wrongfully included tract 2 in his inventory, since it did not belong to the decedent's estate, but to the Mabry children, to the exclusion of Emma, who was of age, and of all creditors; and that the only way in which the probate court could have acquired any jurisdiction over it was through its authority over the estate of the minors, which was not invoked. In the view we take of this case, however, we do not find it necessary to decide this point, Suffice it to say that the respondent meets it by two propositions: 1. That found by the court below, viz., that these minors, after the age of maturity, elected to take under the provisions of the will of their father, instead of as his heirs, and ratified the executor's sale with knowledge of the facts; 2. That the minors, having, after maturity, received their several portions of the proceeds of the executor's sale, with knowledge of the facts, are estopped to say that their title to the land did not pass to the plaintiff by the executor's deed.

We do not agree with the court below, that this was a case of election. The language of the will is not set out in the complaint, and taking the allegations upon the demurrer most strongly against the pleader, the reasonable construction would be that the testator, mindful of the provisions of the law, that upon his death would vest the right to patent and

the fee of the land in his children, he directed the title to the homestead to be perfected for them, and that his land, viz., tract 1, be sold when six thousand dollars could be realized from it. This is, of course, upon the assumption that appellant's view of the homestead law is correct. We have found no clearer statement of the law in regard to elections under a will than that in *Toney v. Spragins*, 80 Ala. 541, where it is said: "In a judicial interpretation of the will, and ascertainment of the real intent, the court will act on the presumption that the testator intends only to charge what belongs to him. When the testator owns a partial or future interest in the property devised, the established rule is, that the courts will strongly lean in favor of a construction which shows an intent to give only the interest of which he has the power of disposition, and with which he is authorized to deal by virtue of his own rights; and will require clear and unambiguous expression, expressly or by clear and manifest implication, of an intent to devise the entire property. To compel an election, it must satisfactorily appear that the testator attempted to dispose of what he did not own. . . . If the expressions of the will are ambiguous or doubtful, and the court cannot determine that it was manifestly the intention to dispose of property not the testator's own, the *prima facie* presumption will prevail."

Admitting, therefore, that Walter P. Mabry had no devisable interest in his homestead, we hold that the rule of construction above laid down would not have required his minor children to make any election, but that they could have successfully claimed this land as their own, and could also share in the estate under the will.

Upon the question of the estoppel, we must, for the purpose of the decision, again assume the law concerning the homestead to be with the appellants. We have, then, the probate court assuming a jurisdiction not warranted by law, and directing the sale of property belonging to the Mabry minors, the executor making the sale, in a lump, of both tracts, for a sum larger than that mentioned in the will, the proceeds of the sale going into the general funds of the estate, where it was subject to the claims of creditors, and the expenses of administration, and the guardian, for the sake of greater certainty to the purchaser, required to go through the form of a sale, the result of which was nothing to the estate of his wards, except as it was thereafter doled out to him by the executor.

We also have the purchaser seeking out two of the heirs, who were then of age, Emma and James, and procuring from them quitclaim deeds, showing some fear on his part that his title was not altogether safe. And over against these matters, all of which make for the appellants, we have only the fact that the other four minors, two of whom came of age in 1884, and two in 1888, as they passed majority, had settlements with the executor, received from him a proportional share of the estate, as though tract 2 had been governed by the will, and made no objection to the proceedings resulting in the deeds to Clancy, nor any claim that tract 2 was not the land of the plaintiff. In short, reduced to its lowest terms, we have A assuming to sell and convey, as his own, the land of B to C, for a consideration not alleged to be sufficient, and B, after years of possession and improvement by C, with full knowledge of the facts, accepting from A the money he received from C, and retaining it. All the rules of honorable dealing between man and man require that he who takes the benefit of a thing in this wise shall not have the thing again, and so the courts have uniformly held. In *Smith v. Warden*, 19 Pa. St. 424, a woman whose interest in certain land was sold by a sheriff, she not being bound by the judgment on which the sale was made, received her share of the purchase-money from the sheriff, and the court said that her acceptance of the money was an affirmation that her title had passed by virtue of the sheriff's sale, which she could not afterwards controvert. What were otherwise void guardians' and administrators' sales have been frequently held to pass the title where the parties interested, being of full age and in possession of the facts, accepted and used the proceeds. In *Davidson v. Young*, 38 Ill. 145, the court held that but for the fact that the proceeds had not been actually received by the defendant, she would have been estopped. In *Walker v. Mulvean*, 76 Ill. 18, the estoppel was sustained where the proceeds had been received by minors after coming of age. So in *Penn v. Heisey*, 19 Ill. 295; 68 Am. Dec. 597; *Pursley v. Hays*, 17 Iowa, 810; and *Deford v. Mercer*, 24 Iowa, 118; 92 Am. Dec. 460.

Appellants insist that in this case the Mabrys took the money from the executor as they found it, and had a right to receive it as the proceeds of tract 1 alone, which he had a right to sell under the will for six thousand dollars; that the purchaser being bound to know the law, he bought with constructive knowledge of all imperfections in the titles assumed

to be conveyed to him, and must be taken to have offered and paid the six thousand and fifty dollars for tract 1, without considering tract 2, which he knew the executor could not sell; and that the doctrine of estoppel cannot apply where the party who asserts it had knowledge of all the facts. But to sustain the estoppel, it is not necessary to consider the acts or the knowledge of the respondent's grantor, Clancy. We may assume everything as against him, and yet it does not appear that he did not suppose he was buying both tracts. He had before him the inventory, the appraisement, the petition of the executor for the sale, the order of sale, the published notice of sale, and the offer at public auction, each and all including and particularly describing tract 2 as a part of the land to be sold; his bid covered both tracts, and the report of sale, the confirmation, and the deed of the executor embraced both. How can we say that he paid nothing on account of tract 2, and that the Mabrys received nothing for that tract from the executor? We certainly cannot do so from the face of this amended complaint, the allegations of which are admitted to be true. Whether for consolation or blame, the appellants must look to the acts of the Mabrys in keeping silent through many years, and in finally accepting the money of Clancy. Had they in their time repudiated the sale, the result might have been different; but as it is, they have confirmed it, and the land belongs to the respondent. Appellant Lichty stands in no better position than his grantors, his quitclaim showing him to be a purchaser with full notice: *May v. Le Claire*, 11 Wall. 217.

As to him, the decree will be affirmed with costs, excepting that all reference to tract 1 will be stricken out; as to the other appellants, it will be reversed with costs, and the complaint dismissed.

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**CLOUD ON TITLE.** — The owner of real property may procure the aid of a court of equity to quiet his title when the lien or encumbrance which constitutes the cloud thereon is one which is regular and valid upon its face, though in fact irregular and void from circumstances which must be proved by extrinsic evidence: *Murphy v. Mayor etc. of Wilmington*, 6 Houst. 108; 22 Am. St. Rep. 345; compare *Rigdon v. Shirk*, 127 Ill. 411; *Welles v. Rhodes*, 59 Conn. 498. Relief may be granted against one who claims to have a mortgage on the premises: *Withers v. Jacks*, 79 Cal. 297; 12 Am. St. Rep. 143; and a mortgage by a grantee of a husband of property purchased with a wife's separate funds, and deeded to her during coverture, is a cloud upon her title, which equity will remove: *Ramsdell v. Fuller*, 28 Cal. 37; 87 Am. Dec. 103.



WHEN PETITIONER HAS LEGAL TITLE AND ADEQUATE REMEDY AT LAW, respondents being in possession without right, and liable to ejectment by petitioner, there is no apparent cloud which needs to be removed, and no ground for equitable relief: *Munson v. Munson*, 28 Conn. 582; 73 Am. Dec. 693; compare *Teague v. Martin*, 87 Ala. 500; 13 Am. St. Rep. 63; *Deer Lake Co. v. Michigan etc. Co.*, 83 Mich. 11; *Lundy v. Lundy*, 131 Ill. 138; *Olayton v. Barr*, 34 W. Va. 290; *Browning v. Lavender*, 104 N. C. 69.

AN INSTRUMENT VOID UPON ITS FACE, or such that the party claiming under it must, in order to recover upon it, necessarily offer evidence that must show its invalidity, is not a cloud upon his title: *Sloan v. Sloan*, 25 Fla. 53; *Scott v. Onderdonk*, 14 N. Y. 9; 67 Am. Dec. 106. The mere assertion of a claim, whether made orally or in writing, does constitute a cloud upon title: *Welles v. Rhodes*, 59 Conn. 498. Nor will a notice from a grantor, who has conveyed his whole interest, that the conveyance to his immediate grantee was on a trust for children, the trust not being declared in writing, cloud the title of a *bona fide* purchaser from a subsequent grantee: *Moran v. Somes*, 154 Mass. 200.

ACTION TO QUIET TITLE cannot be maintained under Illinois and Washington statutes, unless the plaintiff is in possession, or the land is unoccupied: *Wetherell v. Eberle*, 123 Ill. 686; 5 Am. St. Rep. 574; *Spithill v. Jones*, 3 Wash. 290; nor by one in possession who has no legal or equitable title: *Jackson v. La Moure Co.*, 1 N. D. 238. But possession is not essential where the title is equitable: *Sloan v. Sloan*, 25 Fla. 53.

QUITCLAIM DEED CONVEYS all grantor's interest and estate in the land: *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243.

QUIETING TITLE. — See further as to such actions, note to *Wagner v. Low*, post, p. 56.

THE DOCTRINE OF ELECTION applies as well against the heirs of the testator as against other persons; and where one has elected to take a beneficial interest under a will, and has received the same, he cannot afterwards set up a claim of his own: *Beall v. Schley*, 2 Gill 181; 41 Am. Dec. 415. A devisee must not delay his election for an unreasonable time: *Vann v. Newsom*, 110 N. C. 122.

ESTOPPEL. — One who with knowledge accepts the proceeds of an unauthorized sale of his property is estopped to dispute the validity of the sale: *Karns v. Olney*, 80 Cal. 90; 13 Am. St. Rep. 101; *Thompson v. Simpson*, 123 N. Y. 270. The heirs of a decedent who have received the proceeds of an administrator's sale are estopped to deny the validity of the sale even though it be so far void as to convey no title in law; and the principle applies to minors as well as adults: *Woodstock Iron Co v. Fullensider*, 87 Ala. 584; 13 Am. St. Rep. 73.

WHERE THE ANCESTOR IS TRUS ESTOPPED, his heirs are also estopped: *Roberts v. Lindley*, 121 Ind. 57; compare *Taylor v. Street*, 82 Ga. 723. But where a widow conveys in fee-simple land in which she has only a life estate, the remaindermen, her children, though present and acquiescing in the sale, are not estopped from claiming the lands after her death, where it does not appear that the purchaser was misled by their conduct, or was ignorant of their reversionary interest, nor that they were then of age or knew of their interest: *Patty v. Goolbsy*, 51 Ark. 61.

## TACOMA HOTEL COMPANY v. TACOMA LAND AND WATER COMPANY.

[3 WASHINGTON, 216.]

**CORPORATIONS — RULES OF WATER COMPANY — WHEN REASONABLE.** — A rule of a corporation holding a franchise of the right to supply a city and its inhabitants with water, which provides that upon the non-payment, within a reasonable time, of the amount due by a party for water furnished him, the corporation may deprive him of the further use of its water by shutting off the supply until payment of the amount due, is reasonable and binding as against a party furnished with water under a contract, with actual notice of the rule, and its enforcement will not be enjoined.

*Galusha Parsons*, for the appellant.

*W. Lair Hill and Thad. Huston*, for the respondent.

SCOTT, J. The appellant is the owner by assignment of a grant and franchise by ordinance of the city of Tacoma, granting to John W. Sprague, his associates and assigns, "the right and privilege of supplying the city of Tacoma, and the inhabitants thereof, with pure and fresh water, for which they shall be and are hereby authorized to charge the consumers thereof reasonable rates." The appellant, operating under said grant, supplied to the premises of respondent water for and during the three months ending October 1, 1890, for which supply it demanded the sum of \$478.10, which the respondent refused to pay. The appellant added a penalty to said sum, increasing the sum to \$502, and again demanded payment, and upon the continued refusal of the respondent to pay, appellant threatened to shut off and stop supplying the water for respondent's premises; whereupon respondent brought this suit to enjoin the appellant from so doing.

The complaint sets forth the corporate character of the parties to the action, the plaintiff's ownership of the premises described; that the building thereon is a large and expensive hotel, and that "the use of the water furnished by the defendant is absolutely necessary to the use and occupancy of said hotel for the purposes for which it was constructed"; the demand of the sum of \$502 claimed; an allegation that said charge is unreasonable, excessive, and unlawful; an allegation that the plaintiff is, and at all times was, ready and willing to pay a reasonable sum; and alleging the purpose of the defendant to shut off the water and deprive plaintiff of its use, thereby causing the plaintiff great and irreparable injury, etc. The

answer denies that the charge is unreasonable, excessive, or unlawful; denies the readiness of the plaintiff to pay a reasonable sum; admits that it was and is defendant's purpose to deprive the plaintiff of the use of its water for said hotel and premises until it should pay the reasonable charges of defendant for the water furnished it for the quarter ending on the first day of October, 1890; denies that it would cause the plaintiff great and irreparable injury, etc.; and contains an affirmative defense, wherein the corporate capacity of the defendant is set forth; also its ownership of the water franchise, and its rights and authority thereunder. It also contains the following allegations:—

"4. That for the transaction of the business for which it was incorporated, and to enable it to furnish water, as in said ordinance provided, to the said city of Tacoma and its inhabitants, at reasonable rates, it adopted, among others, a rule in the words following, to wit: 'Sec. 19. Water rents will be due and payable quarterly on the first days of January, April, July, and October. In case of non-payment of rents within ten days after they are due, five per cent additional will be added, and if the rents are not paid within fifteen days after they are due, the water will be shut off from the premises, as provided for in sections 20 and 21.'

"5. That to secure compliance with said rules, without which the proper management of the business of said company would have been wholly impracticable, it adopted a further rule as follows: 'Sec. 20. On failure to comply with the rules and regulations established as a condition to the use of water, or to pay the water rents in the time and manner hereinbefore provided, the water may be shut off until payment is made of the amount due, with fifty cents in addition for the expense of turning the water off and on.'

"6. That said rules were made a part of the contract with all persons applying to be furnished with water by this defendant.

"7. That prior to the sixth day of May, 1890, this defendant established the following rates as the rates to be paid by persons desiring that they should be supplied with water by meter, to wit:—

Meter rates, from 1,000 to 50,000 gallons per month, per 1,000 gallons.	\$0 25
Meter rates, from 50,000 to 100,000 gallons per month, per 1,000 gallons.	20
Meter rates, all over 100,000 gallons per month, per 1,000 gallons....	15

That said rates were reasonable, and far below the rates usu-

ally charged by water companies in the United States; that the said rates so charged were well known to the directors and managing officers of this plaintiff; that well knowing the rates of charges of this defendant for water furnished by measurement to the inhabitants of said city, plaintiff applied in writing to this defendant to furnish water for the use of the said hotel, and thereupon agreed to comply with the rules and regulations of this defendant in respect thereto; and that in default thereof, or of prompt payment at the rates so established, or of a failure to comply with the said rules and regulations, the water might be turned off from the premises so supplied, and discontinued until the bills for water furnished previously thereto should have been paid.

"8. That in pursuance of said request, and in accordance with its rules and regulations, defendant furnished water for the use of said hotel for the months of July, August, and September, 1890, to the amount of four million seven hundred and eighty thousand five hundred gallons; that at the established rate when said water was so furnished, to wit, at the rate of fifteen cents for one thousand gallons, it would have amounted to the sum of seven hundred and seventeen and 12-100 dollars (\$717.12), which sum would have been a reasonable and just charge therefor.

"9. That, nevertheless, said defendant having, after the making of said application, reduced its charges below the established rates therefor, as they then existed, to consumer whose consumption should exceed two hundred thousand gallons per month, to wit, to the sum of ten cents per thousand gallons, it voluntarily, and without having agreed so to do, reduced the rate of charges to this plaintiff from fifteen cents to ten cents per thousand gallons. The defendant presented to plaintiff its said bill for four hundred and seventy-eight and 10-100 dollars (\$478.10); and plaintiff, having wholly neglected and refused, for fifteen days after the same became due, to pay for the water so consumed by it, and as provided by the said rules, this defendant, in accordance with its rules and regulations, to wit, with said rule 19, added to the said bill the sum of five per cent (5) of the amount thereof, and presented to this plaintiff a bill therefor, to wit, for the sum of five hundred and two dollars (\$502), as stated in said complaint, which sum still remains wholly unpaid.

"11. And this defendant further says that it has at all times been, and is now, ready and willing to furnish to the said

plaintiff all the water that it may require or demand for its use, at reasonable rates, and below the rates usually charged by water companies elsewhere for the like service, to wit: If the same exceed two hundred thousand gallons per month, at the rate of ten cents per thousand gallons, upon condition that the plaintiff pay for the same as provided by the established and published rules of this defendant, and that it conform to such rules; all of which the said plaintiff, in writing, at the time of its application to be supplied with water, agreed to do "

The plaintiff demurred to the answer, on the ground that it did not state facts sufficient to constitute a defense. The court sustained the demurrer, and upon the refusal of the defendant to plead further, rendered a judgment and decree for the plaintiff.

The controversy is over the reasonableness of the rules and the rate charged, and as to whether appellant had a right to stop supplying the water upon the refusal of respondent to pay the sum in arrear. It is contended by appellant that the demurrer admits not only that the rules were reasonable, but that it was impracticable for appellant to carry on its business without the rules which the answer alleges it had adopted; and that the defendant, at the time of its application, knew what the rules were, and agreed to be bound by them; and that it is likewise admitted that the rate charged was reasonable. The respondent claims there is no admission that it agreed to comply with the rules and regulations of appellant; and quoting from paragraph 7 aforesaid of the answer, says: "This is really the only attempt at an affirmative allegation in the answer, and is very ingeniously pleaded. Much stress is laid upon it by counsel for appellant. It is argued that because respondent made an application in writing to be furnished with water on its premises, that it 'thereupon,' by inference or implication, agreed to comply with the rules and regulations of appellant, whatever they might be, reasonable or unreasonable, and that therefore appellant has a right to shut the water off and deprive respondent of the use thereof, regardless of consequences, simply to enforce the payment of a disputed claim and penalty. This pretended right respondent disputes, and the demurrer does not admit it."

It contends that the actual issue raised by the pleadings is, whether the appellant has a legal right to enforce, or attempt to enforce, the payment of a sum claimed by it to be due, which includes a penalty of five per cent for non-payment for

water furnished by it to respondent, by shutting off the water connections with respondent's premises, and depriving it of the use of water furnished by appellant under its franchise; that said franchise confers upon appellant valuable rights and privileges, and while it is not an exclusive grant by the terms of its charter, that it is so practically; that those rights and privileges are granted by the public, and in consideration therefor it owes something to the public, viz., the "supplying the city of Tacoma, and the inhabitants thereof, with pure and fresh water, for which they shall be and are hereby authorized to charge the consumers thereof reasonable rates"; that no power is conferred in any way upon appellants to arbitrarily establish a rate or charge which the public should be compelled to accept as reasonable. Nor is the appellant in any way given any power, right, or privilege to proceed to the enforcement of the payment of any sum it may claim to be due it in any other way than that possessed by any other individual or corporation, — that is, through the courts, under the forms of law. The respondent further contends that the rules, as well as the rate charged, are unreasonable; that the pleadings disclose a dispute between the parties thereupon, and that the respondent has a right to have these matters determined by the courts in the usual way. And contends further that the answer of appellant is bad on demurrer, because it admits the purpose of appellant to shut off and deprive the respondent of the use of said water on its said hotel premises, which use, the complaint alleges, is absolutely necessary to enable it to conduct its hotel business.

Some of the matters so contended for by respondent, it seems to us, are not involved in the case in its present aspect. The appellant corporation has been expressly granted the right to supply the city of Tacoma and its inhabitants with pure and fresh water, with the right to lay pipes, etc., in the public streets and alleys, for the purpose of carrying the same into effect. Its business is such as is usually carried on by the public, or associated capital, and it is dependent upon the needs of the people in its immediate vicinity for its profit. Its relations to the people, and the rights and privileges it must, from the very nature of its business, necessarily exercise, give it a public character, and to some extent a monopoly, which, it is true, can only be tolerated upon the ground of a reciprocal duty to meet the public want. Its duty is to supply the inhabitants of Tacoma, within the extent of its busi-

ness, who may apply to it therefor, with water for a reasonable price, and upon reasonable conditions. This it can be compelled to do, and respondent is right in its contention that appellant cannot arbitrarily establish prices which must be paid, and conditions which must be submitted to, by the inhabitants of that city, without any regard as to whether such prices and conditions are reasonable or necessary. But as we view the case, this question is not now before us. It does not appear that the city has undertaken in any way to fix prices, or lay down rules to govern appellant's business; and whatever rights the city may have in this respect we are not called upon to consider; but certainly, in the absence of any such attempt upon the part of the city, appellant has a right to establish prices to be paid, reasonable in amount, and to make all needful rules for the management and regulation of its business; and under such circumstances, at least whenever a contest arises over them, these will be questions for the courts to determine. But the answer in this case alleges that the rate of prices established is a reasonable one; and under the familiar rule of pleading that a demurrer admits everything which is well pleaded, this fact, under the present aspect of the case, is settled. So, also, is the fact of the indebtedness for the water previously furnished likewise admitted. We wish this understood as limited to the sum first demanded. The power of the water company to impose an additional sum by way of penalty in case of non-payment stands upon a different footing from that of the power to establish the price in the first instance, not being dependent upon any facts as to the costs and expenses of supplying the water and carrying on its business, and a reasonable profit thereon. As to whether the penalty could be sustained might be regarded as a question of law for us to determine as to its being authorized, or a reasonable charge, did we find it necessary for us to pass upon it in the disposition of the case, unless it should be sustained upon the ground that it was a part of the original price, which the respondent contracted and agreed to pay in case of the contingency arising. But in any event, it stands admitted that the rate fixed is reasonable, that the respondent used the water for a time specified, and that it is indebted to the appellant therefor in the sum first demanded, and there is no claim that it has ever tendered any sum. The allegation in the complaint of a readiness and willingness to pay does not amount to this, even if it could be considered.

Now, then, could the water company refuse to supply the hotel company with water any longer unless it would pay the sum already due? Whether the contract between the parties was for a specified time not yet expired, or was a continuing one, is not apparent, and it does not matter, for it is admitted that the sum stated was due under the contract, whatever it was. There was no new application for water subsequent to the one under which the water up to October 1, 1890, had been furnished, and we are of the opinion that the water company had the right to require the payment of the sum so due as a condition precedent to its continuing to supply the hotel company with water under the general rule it had previously established, and it is not necessary to discuss the question whether the reasonableness or necessity of this rule is admitted by the pleadings, for we find as a matter of law that it is reasonable. Nor are we required to find whether it stands admitted by the pleadings that the hotel company contracted in writing in its application for water to be bound by the water company's rules, for it was bound in any event by the reasonable rules of the water company of which it had actual notice. And it did have notice of this rule, at least when payment was demanded; and it is not claimed that the hotel company made any attempt to comply therewith, nor that it was not given a reasonable time therefor. We do not decide that the water company could not refuse to furnish water until the sum due had been paid, whatever the facts may have been as to the contract, or in case of a new application, unless, perchance, the contract provided otherwise, or a new contract should be entered into ignoring the sum due.

In *Williams v. Mutual Gas Co.*, 52 Mich. 499, 50 Am. Rep. 266, it is held that the gas company had the right to demand a deposit of money in advance, by way of security, before it could be compelled to furnish gas. In that case the applicant had been using about sixty dollars' worth of gas per week, and its requirements were increasing, and the court sustained a demand for a deposit of one hundred dollars. Seventy-five dollars had been tendered therefor. In *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, 70 Am. Dec. 479, the court says: "The third rule of the company, allowing the company to demand security for the gas consumed, or a deposit of money to secure payment thereof, appears to be just and necessary to guard against loss. As the delivery of the gas is necessarily



its consumption, and as the amount delivered is ascertained by the amount consumed, it would seem to be just and right that the company should not be compelled to furnish it, without reasonable security for payment, in convenient amounts and at proper periods."

In *People v. Manhattan Gas Light Co.*, 45 Barb. 136, it is held that the company may shut off the supply of gas until it has been paid the amount due for gas previously furnished. And these authorities apply as well to a water company as to a gas company, although water is a necessary of life. So far as its use is required as a necessity of life, if a case could possibly arise where an applicant could not get water otherwise there, or go elsewhere to get it, it would be the duty of the public authorities to furnish it to him at the public expense. In *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. St. 394, it is said that the supplying of water and gas is not a municipal duty. "Hence, when the city undertakes to do so, it acts not by virtue of any rights of sovereignty, but exercises merely the functions of a private corporation: *Western S. F. Society v. Philadelphia*, 31 Pa. St. 175; 72 Am. Dec. 730; *Wheeler v. Philadelphia*, 77 Pa. St. 338. The introduction of water by the city into private houses is not on the footing of a contract, but of a license which is paid for: *Smith v. Philadelphia*, 81 Pa. St. 38; 22 Am. Rep. 781. It may very well be that when a license has been given by the city to the owner of a house to use the water, such license may not be withdrawn arbitrarily, or from mere caprice. But it is equally clear that the city may adopt such rules in regard to the use of the water and the payment therefor as the municipal authorities shall deem expedient."

And it was held in that case, where the ownership of the premises had changed, and where payment for the water furnished for one year immediately preceding the purchase had been tendered by the new owner, it being conceded that this was a proper charge under the city ordinance, that the city could not be compelled to furnish water for the premises aforesaid, unless the applicant would pay the sum in arrears for water furnished during three years preceding the change of ownership, with certain penalties thereunto added, although the city had neglected to take any steps according to the terms of the ordinance to collect the sums so due for the previous years. As to the authority of such companies to establish

reasonable rules, see 1 Morawetz on Corporations, sec. 501; 1 Waterman on Law of Corporations, sec. 77.

The condition imposed, that the company might refuse to furnish water to an applicant refusing to pay for it a sum due for water furnished thereunder, is, in one sense, a security for the payment thereof. Instead of forming an estimate of the water that would likely be used, and requiring a deposit in advance of a sufficient sum of money to cover the same, or requiring other security for the payment thereof, the water company provides that at stated periods payments shall be made, in order that a large sum may not accumulate, it being willing to take its chances for a stated time without other security; surely this is more lenient than either to demand a bond or other security, or a deposit of a sum of money in advance large enough to be reasonably certain of covering the sum that should become due.

Under the view we have taken of the state of the case, the authorities cited by respondent going to cases where an issue has been raised over the amount due are not applicable. Of course the respondent has the right to contest the fact of the indebtedness, and of the reasonableness of the rate, unless it has agreed to pay according to such rate, and even in that case, should it appear that it was compelled to make such an agreement in order to obtain the immediate necessary use of the water.

Appellant makes the point that the demurrer to the answer could not be sustained in any event, whatever the court might hold upon the other questions, because the demurrer goes to the whole answer, and as the first part of it only denies, and tenders an issue upon the allegations of the complaint, it is unquestionably good; consequently the demurrer should only have been directed to the new matter; otherwise the answer raising an issue as to the allegations contained in the complaint, the demurrer must be overruled. While we think this point is well taken, we have considered the real merits in the other questions raised as they appeared to us.

Reversed and remanded.

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THE DUTIES, RIGHTS, AND LIABILITIES of companies chartered to supply water to cities are analogous to the duties, rights, and liabilities of companies chartered to furnish gas; and for a discussion of the latter, see *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539; 70 Am. Dec. 479, and note 485-489; *Williams v. Mutual Gas Co.*, 52 Mich. 499; 50 Am. Rep. 266.

**MUNICIPAL CORPORATIONS — CUTTING OFF WATER SUPPLY.** — Where a municipality undertakes to supply water at certain rates, and receives payment for a year's supply in advance, it cannot shut off the water for the reason that the householder's predecessor did not pay for the supply of the year next preceding: *Merrimack River Sav. Bank v. Lowell*, 152 Mass. 556.

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## MCKAY v. RUSSELL.

[3 WASHINGTON, 273.]

**FRAUD — EVIDENCE OF, IN OTHER TRANSACTIONS.** — In an action to recover money paid under a contract for the sale of land alleged to have been procured by false and fraudulent representations, evidence of similar representations made to a third party in a similar but distinct transaction is inadmissible.

*Jacobs, Jenner, Legg, and Jacobs*, for the appellants.

*Kilgen, Kelleher, and Emory*, for the respondent.

DUNBAR, J. Respondent contracted with appellants to buy a certain number of town lots in the town of Ballard, in King County, Washington, making a payment of \$860; the balance, \$140, was to have been paid in a few days. It seems that the contract was made and the money paid by respondent without first looking at the lots, he alleging that he relied exclusively upon the integrity of the appellants, and bought entirely upon the strength of the representations made by them. It is claimed and alleged by the respondent that when he came to see the lots which he had bought, they were only half the size appellants had represented them to be, and that they were not in the same or as favorable a locality as appellants had represented them to be; that the representations made by the appellants were falsely and fraudulently made; that they were untrue in every respect, and that they were made with the knowledge that they were untrue, and with the intention of inducing respondent to act thereon to his damage; that within a reasonable time after the discovery of the alleged fraud, respondent indicated to appellants that it was his intention to proceed no further with the contract; he refused to pay the balance due on the contract, and rescinded the same, and demanded the return of the money paid, to wit, \$860; and upon the refusal of the appellants to pay him back the same, he brought his action for the sum of \$860, with interest thereon from the date of payment. Appellants admitted the contract of sale, but denied all the allegations of misrepresentation or

fraud. There were some affirmative allegations in the answer, but their discussion is not necessary to a determination of this case.

During the trial, the court permitted one Steers to testify that he had purchased town lots of defendants in the same town a few weeks prior to the purchase by plaintiff, in which purchase Steers claimed to have been defrauded in much the same way that respondent claims to have been defrauded. This testimony was admitted over the objections of appellants and is the first ground of error alleged here. We think there can be no doubt that the admission of this testimony was error; and while there seems to be some little conflict of authority on this subject, when the particular facts of the cases are considered, it will be found that the conflict is more seeming than real; and we think no case has gone so far as this court would have to go to hold this testimony admissible. Of course the affirmative rule is, that collateral facts are inadmissible. Some courts have talked about exceptions to this rule, and many controversies have arisen as to whether this or that particular state of facts fell under the exception. Mr. Greenleaf, in his work on evidence (vol. 1, sec. 53), in speaking of this rule, seems to clearly indicate the character of collateral evidence which is admissible. Says the author: "In some cases, however, evidence has been received of facts which happened before or after the principal transaction, and which had no direct or apparent connection with it; and therefore their admission might seem, at first view, to constitute an exception to this rule. But those will be found to have been cases in which the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral and foreign to the main subject, had a direct bearing, and was therefore admitted."

And this has been the uniform test in all well-considered cases. Where, in a criminal action, the question to be determined was whether an act was accidental or intentional, evidence is admissible to show that other acts of the same character have been intentionally done by the defendant. Thus it has been held that where a prisoner was charged with the murder of her child by poisoning, and her defense was that the death resulted from the accidental taking of such poison, evidence was admissible to prove that two other children of the prisoner and a lodger in her house had died from the same poison: *Rex v. Colton*, 13 Cox C. C. 400. So where the guilty

knowledge of the defendant is a question in issue, it has been uniformly held that evidence is admissible of similar acts of the prisoner at different times, if such acts tend to prove the existence of such guilty knowledge. Thus, where a person was indicted for passing counterfeit money, testimony showing that he had passed counterfeit money to other persons would be admissible to prove his guilty knowledge. And yet this character of testimony should always be admitted by the court with great caution and care, and the court should instruct the jury for what particular purpose it is admitted; otherwise the jury is liable to lose sight of the true purpose of the testimony, and the result will be to prejudice them against the defendant, and to adjudge him guilty, not on the testimony tending to prove the crime charged, but of a charge of some other crime which he has had no opportunity of defending himself against. And the same caution should be observed in the trial of a civil action, lest the minds of the jury, by the introduction of a multiplicity of collateral issues, be led away from the main points in issue, and the proof directed to other points in an investigation of the merits or demerits of the parties in some other transaction, which is not before them for investigation.

We do not think the authorities cited by respondent sustain his contention. *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731, which is the leading case in Massachusetts, seems, both in its utterances and in its decision, to be squarely on the other side. There the plaintiff alleged that the defendant had obtained a bill of goods by false representations as to his solvency, and with the intention not to pay for them; and at the trial the plaintiff, over the objection of the defendant, offered testimony tending to show that the defendant had obtained goods from other parties about the same time, under the same representations that he had made to plaintiff. That was a stronger case, so far as indicating any general scheme was concerned, than the case at bar; but the supreme court, after an extensive review of the authorities, decided that the admission of such testimony was prejudicial error. And the court says: "We think it is clear that upon the issue whether the defendant made the alleged representations to the plaintiffs, the evidence admitted was incompetent; the fact that a defendant has committed a similar but distinct crime or fraud is not competent to prove that he committed the particular crime or fraud with which he is charged. . . . The cases are numerous in which this subject has been discussed. We think

the true rule to be deduced from them is, that another act of fraud is admissible to prove the fraud charged only where there is evidence that the two are parts of one scheme or plan of fraud committed in pursuance of a common purpose."

In *Wiggin v. Day*, 9 Gray, 97, the evidence offered was, that the defendant, at the time he purchased the wagons of plaintiff, was insolvent, and at about the time of the purchase he purchased a large amount of personal property of third parties, and got them into his hands by fraud, and then secreted them in numerous places. The court sustained this testimony; but the secreting of the goods, under the circumstances of that case, showed that the acts charged were so connected as to make it apparent that the defendant had a common purpose in all of the purchases, and that he had formed a general scheme to cheat. This was a Massachusetts case, decided prior to *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731, and was noticed and distinguished by the opinion in that case. *Castle v. Bullard*, 23 How. 172, is a case where a firm of auctioneers or commission merchants had obtained control of the goods of the plaintiff, and sold them to an irresponsible purchaser. It is alleged in the complaint that the firm of auctioneers had conspired with the purchaser to cheat and defraud the plaintiff. It appeared in the testimony that the defendants had represented to plaintiff that the purchaser was solvent, while in fact he was insolvent. Evidence was also introduced tending to show that two or more of the defendants had represented to other persons about the same time that the purchaser of the goods in question was in good standing, and that they had likewise assisted him in obtaining credit with other dealers in merchandise. This testimony was sustained by the supreme court of the United States, and while some of the general statements made by the court seem to bear out respondent's contention, yet when we consider the circumstances of the case, and what was actually decided, it will not bear such a construction. The testimony offered tended to show a conspiracy, and a well-concerted scheme between defendants and the purchaser to cheat and defraud the merchants of the country, and under all the authorities such a general scheme could be shown to prove the intention of the defendants in the transaction in question. *Butler v. Watkins*, 13 Wall. 456, was a case where the defendants had contracted to manufacture and sell the "Butler cotton tie," an invention on which Butler had procured a patent, agreeing to give Butler a share of the

proceeds of sale. The contract was never carried out by the defendant, and Butler sued Watkins and the "Patent Nut and Bolt Company," of which Watkins was the agent. It seems that the defendants were largely interested in the sale of the "Beard" and other cotton ties, and plaintiff alleged that the doings of Watkins & Co. were deceitful and in bad faith from beginning to end; that they entered into the negotiations with the purpose of imposing upon him, and keeping his tie out of the market for that season, and by that means rendering more certain the sale of the Beard and other ties which Watkins & Co. already had control of, and that by reason of such arrangement his tie was kept out of the market during the year 1868, and a larger quantity of the Beard and other ties were thereby sold, to the benefit of defendants. Evidence to substantiate the complaint being before the jury, the plaintiff offered in evidence certain letters written by the defendants to Charles Wailey (who, it was said, had also invented a cotton tie), in the spring and summer of 1868, wherein the defendants led the said Wailey to believe that a contract between himself and Watkins, managing director of the company, had been recognized by them, and would be by them carried out; and letters were offered, in connection with the testimony of Wailey, for the purpose of showing the fraudulent and deceitful conduct of defendants in keeping Wailey's tie out of the market in the year 1868, in order to advance their own interests by the sale of the Beard tie, with the object of showing to the jury the systematic manner and course of the defendants in fraudulently preventing the sale of other cotton ties. This testimony was rejected by the trial court, and the supreme court of the United States held that it was admissible. But the facts laid down in that case bring it also within the rule laid in *Jordan v. Osgood*, 109 Mass. 457; 12 Am. Rep. 731. And so with all the cases cited by appellants. But in the case at bar, the transaction sought to be proven was a distinct and independent transaction, having no bearing on the case at issue; all that it could prove to the jury, if they believed it, was, that the defendants were tricky men, and that they had cheated some one else in some other land transaction, which was in no way connected with the land involved in this case or with the party plaintiff. The mere fact that a man has cheated his neighbor in some transaction does not justify the inference that he has formed a general scheme to cheat other men; the establishing of the fact that a man has lied

will not justify the inference that he has formed a general scheme to lie in every business transaction which he has. If such testimony were admitted, verdicts could be rendered more with reference to the reputation of the litigants than to the merits of the particular case.

In *Edwards v. Warner*, 35 Conn. 517, it is held that evidence that defendant has been guilty of other like-frauds is never admissible for the purpose of showing his bad character, and the greater probability on that account of his having committed the particular fraud charged. In *Commonwealth v. Damon*, 136 Mass. 441, the court lays down the rule, that in cases in which fraud is involved, it has been settled that evidence of fraudulent transactions with other persons will not be admitted upon the question of intent, unless there appears to be some connection between the fraud alleged and the other transactions from which the jury can find a purpose common to all. To the same effect is *Stockwell v. Silloway*, 113 Mass. 384; *Haskins v. Warren*, 115 Mass. 514; *Horton v. Weiner*, 124 Mass. 92; *Commonwealth v. Jackson*, 132 Mass. 16.

We think the admission of the testimony complained of was error which was prejudicial to the rights of defendants, and that they should have a new trial. The other errors alleged seem to us to be without merit, and they are overruled.

For the errors alleged in the first assignment, the judgment is reversed and the cause remanded.

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**EVIDENCE—FRAUD.**—When a purchase is claimed to have been fraudulent, evidence of distinct fraudulent purchases made at or about the same time as the purchase in question is admissible: *Oary v. Hotelling*, 1 Hill, 311; 37 Am. Dec. 323, and note; *Perkins v. Prout*, 47 N. H. 337; 93 Am. Dec. 449; *Eastman v. Premo*, 49 Vt. 355; 24 Am. Rep. 142. But such other transactions must be so near to the one in suit in question of time, and so similar thereto, that the same fraudulent motive may reasonably be imputed to all: *Hall v. Naylor*, 18 N. Y. 583; 74 Am. Dec. 209, and note.

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## ROBINSON v. MARINO.

[3 WASHINGTON, 431.]

**APPEAL — OBJECTION TO COMPETENCY OF WITNESS AS AN EXPERT** not made in the lower court will not be noticed on appeal.

**ANIMALS — VICIOUS DOG — EXPERT EVIDENCE AS TO CAUSE OF WOUNDS.** —

In an action to recover for injury from the bite of a vicious dog, the opinion of a practicing physician and surgeon, as to what was the probable cause of the wounds inflicted on the complaining party, is admissible.

**ANIMALS — VICIOUS DOG — EVIDENCE.** — In an action to recover for injury from the bite of a vicious dog, evidence that on a prior occasion the same dog had bitten, or attempted to bite, a third person, is admissible to show the viciousness of the dog.

**ANIMALS — VICIOUS DOG — SUFFICIENCY OF EVIDENCE.** — In an action to recover for injury from the bite of a dog alleged to be vicious, evidence that the dog had always been kept chained; that he would bark and jump at persons going near him when chained, and endeavor to get loose; that when at large he had run after a woman and seized her dress; that his owner had stated that he feared that the dog would get loose and bite a child; and that when at large he had inflicted the injury complained of, — is sufficient to establish the viciousness of the dog, his owner's knowledge thereof, and his negligence in allowing him to be at large.

**ANIMALS — VICIOUS DOG — NOTICE TO AND LIABILITY OF OWNER.** — Actual or implied notice to the owner of a dog that its disposition is such that it would be likely to bite persons if allowed to run at large, and commit an injury similar to the one complained of, is sufficient to make the owner liable in damages, without proof that the dog had previously bitten any person; and the fact that it broke loose, or was untied by some other person, and without the owner's knowledge or consent, will not, of itself, exempt him from liability for injury inflicted by the dog while so at large.

**ANIMALS — VICIOUS DOG — PHYSICAL PAIN AND MENTAL ANGUISH AS ELEMENTS OF DAMAGE.** — A person injured by a dog known by his owner to be vicious may recover damages for all the direct and necessary results of the injury received, including physical pain and mental anguish. Such damages are implied by law, and need not be specially alleged.

*White and Munday*, for the appellant.

*T. H. Cann, and Battle and Shipley*, for the respondents.

ANDERS, C. J. This was an action brought by respondents, as husband and wife, to recover damages for injuries inflicted upon the plaintiff Carrie Robinson, by a dog owned and kept by appellant.

On the trial, one Dr. Hilton, a witness for plaintiff, having testified that he treated two wounds on plaintiff, which he described, was asked this question: "From your knowledge as a surgeon and general practitioner, can you tell what the probable cause of those wounds was?" The question was objected to by defendant, on the ground that the same was incompetent, and was not in the nature of expert testimony.

The court overruled the objection, and exception was duly taken and allowed, and this ruling of the court is assigned as error. Appellant also insists that the witness was not shown to be competent to testify as an expert, but it is a sufficient answer to this objection to state that the point was not raised in the court below, and cannot be urged for the first time here. We must therefore assume that the witness was competent. Indeed, the competency of the witness as an expert is sufficiently disclosed by the record, for it is there shown that he had been a practicing physician and surgeon for twenty years, and was still practicing as such at the time of the trial.

Physicians and surgeons of experience are presumed to be acquainted with all matters pertaining to their profession, and to be competent to testify concerning the same: Rogers on Expert Testimony, 2d ed., 43, 99. And that a medical expert may give an opinion as to the means by which a particular wound was inflicted is the prevailing doctrine of the courts: Rogers on Expert Testimony, 2d ed., 127, 128, and cases cited. But the question here objected to called for no opinion whatever, except as to whether the witness had sufficient knowledge to tell what probably caused the wounds described. He was not asked to state what caused them, or even what probably caused them. The question was preliminary in its nature, and the objection was properly overruled. But even if it was error to permit the question to be propounded to the witness, we think the judgment should not be reversed, as the defendant could not have been prejudiced thereby. It was clearly shown by other competent testimony in the case that the plaintiff Mrs. Robinson was bitten by defendant's dog, and that whatever injuries she suffered resulted therefrom. The admission of incompetent testimony under such circumstances would not justify us in reversing the judgment of the trial court: *Brown Brothers & Co. v. Forest*, 1 Wash. T. 201.

Appellant also insists that it was error to permit the witness Addie Simons to testify to particular instances of the action of the dog in question, for the reason that no testimony had been offered to show that defendant had any knowledge of the same, and that it was not competent to prove the disposition of the dog by such testimony. We think the objection cannot be sustained. It was alleged in the complaint that the dog was of a ferocious and mischievous disposition, and accustomed to attack and bite mankind, and it is quite

evident that that fact could not be more readily made manifest than by testimony descriptive of his actions. Whether or not the dog was vicious was one of the principal issues to be determined by the jury, and it was certainly competent to show that previously to the occasion on which he attacked Mrs. Robinson he had bitten, or attempted to bite, another person.

It is alleged in the brief of appellant that the evidence on behalf of the plaintiff failed to show that the dog was of a ferocious disposition, and failed to show that defendant had notice or knowledge of such disposition, and failed to show any negligence on the part of the defendant in suffering the dog to be at large, and it is therefore contended that defendant's motion for a nonsuit should have been granted. But we are of the opinion that there was sufficient testimony to go to the jury upon each of the points made by counsel. Several witnesses for the plaintiff had testified that the dog had always been kept chained, which was strong evidence that he was ill-disposed, and that he would bark and jump at persons going near him while tied, and endeavor to get loose. The plaintiff Mrs. Robinson testified that she had lived on the opposite side of street from the residence of the defendant for about three years, and that she had known the defendant's dog during that time, and that on the morning of November 2, 1890, she went to the house of defendant to get vegetables, as she had been accustomed to do; that when she got to the corner of the house the dog was lying with his nose on the doorstep, which she thought was something unusual, and sprang upon her and bit and bruised her badly, and bit her arm to the bone; and Mrs. Simons had testified that on one occasion, and the only time she ever saw the dog at large, she saw him run after and seize hold of a woman's dress as she ran out through the gate; and Mr. Peterson had testified that the defendant stated to him the summer before that he was afraid that his dog would get loose and bite his (Peterson's) child, because she was in the defendant's garden so much. With such testimony before it, the court would not have been justified in granting defendant's motion.

The owner of a domestic animal is not liable, in the absence of statutory provision, for any injury it may inflict upon others, unless he has notice of its inclination to commit such an injury. But according to the more modern and more reasonable doctrine, it is not necessary that he should have had

actual positive notice. If he has notice that the disposition of the animal is such that it would be likely to commit an injury similar to the one complained of, it is sufficient. It is not necessary that the notice be of injury actually committed. Thus, in case of a dog known to be vicious and ferocious by its keeper, it is unnecessary to show that he had previously bitten any person. The keeper of such a dog must see to it that he is kept securely, or be responsible for all injury done by him: Cooley on Torts, 2d ed., 404, 405, \*343, \*344; 2 Shearman and Redfield on Negligence, 4th ed., sec. 630; *Flansburg v. Basin*, 3 Ill. App. 531; *Godeau v. Blood*, 52 Vt. 251; 36 Am. Rep. 751. In the case last cited, Redfield, J., said: "The duty which the law casts upon the keeper of a malicious and dangerous domestic animal is but the enforcement of a common moral duty, binding upon all men, that a man should so keep and use his own property as not to wrong and injure others. The formula used in text-books, and in forms given for pleadings in such cases, 'accustomed to bite,' does not mean that the keeper of a ferocious dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person. But as he is held to be a man of common vigilance and care, if he had good reason to believe, from his knowledge of the ferocious nature and propensity of the dog, that there was ground to apprehend that he would, under some circumstances, bite a person, then the duty of restraint attached, and to omit it was negligence."

In this case, it was not shown that the defendant had any knowledge that the dog had ever attacked or bitten any person before he attacked the plaintiff; but we think it was fairly shown that he knew, or should have known, that the disposition of the dog was such as to make it highly probable that he would bite some one in case he should ever break his fastening or be untied, and it was therefore the duty of the defendant to effectually restrain him: 2 Shearman and Redfield on Negligence, sec. 628. And the fact that he endeavored to do so, and that the dog broke loose or was untied by some other person, and without his consent or knowledge, will not, of itself, exempt him from liability for injury inflicted by the dog while so at large: *Partlow v. Haggarty*, 35 Ind. 178; *Wilkinson v. Parrott*, 32 Cal. 102; *Muller v. McKesson*, 73 N. Y. 195; 29 Am. Rep. 123. In *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123, it was held that in an action against the owner of a ferocious dog for injuries inflicted by it, proof that the animal

is of a savage and ferocious disposition is equivalent to express notice. And it has even been held that the knowledge of the wife is the knowledge of the husband in such cases: 2 Shearman and Redfield on Negligence, sec. 630, note.

The defendant testified in his own behalf that the reason he always kept the dog chained was to prevent him from following his team as he went around town selling vegetables. He also stated that he did not recollect ever telling Peterson he was afraid his dog would bite his child, and did not think he so stated, and that he never was afraid the dog would bite anybody, and that the dog had never before bitten any one, and that no one had ever complained of the dog to him. Defendant's wife also testified that the dog never bit any person before, but neither of them contradicted the testimony of plaintiff's witnesses that he was "cross," and would jump at persons while chained, and try to get loose. The court properly instructed the jury upon the law applicable to the case, and specially charged them that before plaintiffs could recover in the action they must be satisfied, by a preponderance of the evidence, that the defendant had knowledge that the dog was of a ferocious and mischievous disposition, and accustomed to attack and bite mankind. The jury must have found, upon all the facts and circumstances in evidence, that defendant had such knowledge, and we cannot say that their verdict was unwarranted by the evidence, and therefore find no error in the refusal to grant a new trial.

Appellant further contends that plaintiffs were not entitled, upon the pleadings and evidence, to a verdict for more than the amount paid for medicines and medical attendance. It is claimed that there is no sufficient allegation of special damage in the complaint, and no proof whatever of the value of plaintiff's services, or of the amount of damage sustained by her; that whatever damages she sustained were not the necessary consequences of her injuries, were therefore special, and consequently not recoverable in this action, because not alleged. It is true that there is no proof of the value of plaintiff's services. And it is therefore reasonable to presume that the jury awarded no damage on that account. But we think the learned counsel for appellant are in error in assuming that under the allegations of the complaint, no damages can be recovered, except the amount shown to have been paid for medical services and medicine. The complaint alleges: "That the said dog, while in the wrongful keeping of defendant, as

aforesaid, and wrongfully and negligently suffered by defendant to go at large without being properly guarded, and confined as aforesaid, attacked and bit plaintiff Carrie Robinson on the arm and wrist, and on her side, thereby severely wounding and injuring her, said plaintiff, whereby she suffered, and still suffers, great pain of body and mind, and thereby was prevented, for the period of five days, from attending to her household duties, and was obliged to and did expend the sum of fifty dollars for medicines and the services of a physician, in the endeavor to heal herself of said wounds and injuries; that by reason of said wounds and injuries, plaintiffs have been damaged in the sum of two thousand five hundred dollars."

It is a well-settled principle of law that damages which are the natural and necessary result of an injury need not be specially pleaded. The plaintiff had a right, under the allegations of the complaint, to recover a fair compensation for all the direct and obvious results of the injuries received, including physical pain and mental anguish. Such damages are implied by law, and need not be specially alleged: 3 Sedgwick on Damages, 8th ed., sec. 1270; 3 Sutherland on Damages, 715; *Curtis v. Rochester etc. R. R. Co.*, 18 N. Y. 534; 75 Am. Dec. 258; *Tyson v. Booth*, 100 Mass. 258. And no doubt the jury, in estimating the damages, took into consideration, as they had a right to do, not only the physical and mental suffering of plaintiff, but also the effect produced upon her nervous system, as shown by the evidence, and for which she was treated by her physician for some six weeks after the wounds upon her person had healed.

It is further contended by appellant that the verdict for eight hundred dollars is excessive. We cannot agree with counsel for appellant, that the injuries received by plaintiff were altogether of a trifling character. The wound upon her wrist, while only about the diameter of an "eight-penny" nail, penetrated to the bone. Her dress and corset were bitten through, and her side lacerated for the space of three quarters of an inch, and to the depth of a quarter of an inch. But her greatest injury resulted from the fright and mental terror, and the nervous shock produced by the unprovoked, sudden, and unexpected attack upon her by this savage and infuriated beast. She says she was rendered so nervous that she could scarcely sleep for some time afterwards, and according to the testimony of her husband, when she heard the dog barking, as she often did, she was so terrified that he was afraid she

would go into convulsions. And there was testimony tending to show that she was still suffering from nervousness at the time of the trial. It is impossible to lay down any precise rule for measuring the damages in cases like the one at bar, and the amount of recovery must of necessity be left to the sound discretion and judgment of the jury, subject to be revised by the court when it clearly appears to be excessive. While the amount of the verdict may seem large, we cannot say that it is so disproportionate to the injury as to indicate that it was the result of passion or prejudice on the part of the jury, and we therefore see no reason for disturbing it.

The judgment of the court below is affirmed.

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**VICES AND ANIMALS — DOGS.** — As to what constitutes a vicious dog, what is notice to the owner, and the liability of the owner with notice for injuries done by the dog, see *Knowles v. Mulder*, 74 Mich. 202; 16 Am. St. Rep. 627, and note 631, 632. In Maine, to recover for injuries done by a dog, the plaintiff makes a *prima facie* case by proving that he was injured by a dog kept by defendant: *Hussey v. King*, 83 Me. 568. See also *Fals v. Addicks*, 45 Minn. 37; 22 Am. St. Rep. 716, and note.

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## WAGNER v. LAW.

[3 WASHINGTON, 500.]

**FRAUDULENT CONVEYANCES — EXECUTION SALES — QUIETING TITLE — A** judgment creditor, who is also the execution purchaser, may maintain an action to set aside a fraudulent conveyance of the land purchased, made by the judgment debtor, and to quiet the title acquired at the execution sale. The right to maintain such action is not affected by the fact that the land was purchased by the judgment creditor, because of the existence of such fraudulent conveyance.

**FRAUDULENT CONVEYANCES — EXECUTION SALES — QUIETING TITLE — PLEADING.** — In an action by an execution purchaser to quiet title and to set aside a fraudulent conveyance of the lands, made by the judgment debtor, a statement in the complaint of the facts constituting plaintiff's interest in the lands is sufficient, without an allegation that he has a valid interest in the lands.

**FRAUDULENT CONVEYANCES — EXECUTION SALES — QUIETING TITLE — PLEADING.** — A complaint in an action by a judgment creditor, who is also the execution purchaser, to quiet title and to set aside a fraudulent conveyance of the lands made by the judgment debtor, which fails to aver that the latter had no other property subject to execution at the time the fraudulent conveyance was made, is fatally defective.

**FRAUDULENT CONVEYANCES — EXECUTION — SALES — QUIETING TITLE — LIMITATIONS.** — An action to remove a cloud on title caused by a fraud-

alent conveyance is not an action for relief on the ground of fraud, and is not subject to the limitations imposed by statute on such actions.

**APPEAL — MODIFICATION OF JUDGMENT.** — Where a judgment on demurrer dismissing a complaint is affirmed on appeal, the appellate court will modify the judgment on motion so as to remand the case with leave to amend the complaint.

*Judson and Sharpstein, and Crowley and Sullivan*, for the appellant.

*B. F. Dennison and James M. Ashton*, for the respondents.

DUNBAR, J. This is an action brought by the judgment creditor, who was also an execution purchaser, to set aside a fraudulent conveyance made by the judgment debtor, which is alleged to be a cloud upon the plaintiff's title. The complaint alleges the fraudulent conveyance of the land for the purpose of defrauding his creditors, and especially the plaintiff; alleges the execution and sale and conveyance of the land in question to plaintiff. A demurrer was interposed to the complaint, and sustained by the court below. Judgment was entered in favor of the defendant, and the case is appealed here. The sixth count in the demurrer was as follows: "That said complaints, and each of them, show upon their face that by proceeding to a sale of the land on execution before the previous deeds of the judgment debtor had been set aside by bill in equity, and the title reinvested in him, the plaintiff waived her right to claim relief in equity."

The main question to be determined by this court is involved in this proposition, it being contended by the respondent that a bill to quiet title or to remove a cloud must be brought by the judgment creditor in the nature of a creditor's bill, or after an execution and return of *nulla bona*, and that the fraudulent conveyance must be set aside before the property is subjected to the operation of the execution; and that after such a sale it is too late to bring such an action. While the appellant insists that under our statutes, and the English statutes which are part of our common law, in addition to the other remedies which the law allows the creditor, he has a right to levy execution upon the property conveyed as if the same then stood in the name of the judgment debtor, and to advertise and sell the same in the manner provided by law as the property of the judgment debtor.

On this proposition, after an examination of all the cases cited which were available, and after as laborious and extended an investigation as time would permit, we are inclined to



adopt the views of the appellant. The authorities in support of appellant's views on this proposition are certainly overwhelming, and we do not feel at liberty to disregard them in establishing a rule for this state. Nor do we think, as alleged by respondent, that the cases cited by appellant declaring the right of an execution purchaser to sustain a suit to remove a cloud on his title were decided on local statutes different from ours. In some instances this doubtless was the case, but in many others the doctrine was sustained on the particular ground that such a conveyance falls within the provisions of the statute of frauds, and of 13 Elizabeth, which is in force, as we understand it, in the state of Washington, by virtue of section 1 of the code. This was the basis of the decision in *Hildreth v. Sands*, 2 Johns. Ch. 35, where the doctrine was announced that a purchaser at a sheriff's sale, under the judgment of a creditor, is entitled to the benefit of the statute of frauds equally as the creditor himself. And as to the relative rights of the purchaser and the creditor, and the claim interposed that such a proceeding is inequitable because the property under such a sale is likely to be sacrificed, we quote the words of the chancellor in that case: "The statute of 13 Elizabeth, which we have adopted, is said to be declaratory of the common law, and to extend to creditors and to all others who have any cause of action, and is to be construed liberally in suppression of fraud. Lord Coke says, in *Twine's Case*, 3 Coke, 80, that it was so resolved by all the barons of the exchequer. So in *Tarvil v. Tipper*, Latch, 222, a bailiff who executed process was allowed to protect himself under this statute against a fraudulent gift, for it was observed that when the statute gives the principal remedy, it gives the incident. If it protects the creditor, it must protect his sale, and the purchaser under his judgment. The creditor, on any other construction, would be deprived of the fruit of his judgment, and the execution would be nugatory. There can be no doubt but that the plaintiff, as a purchaser under Whitney's judgment, is entitled to all the relief that the creditor himself would have been entitled to, for he stands in his place, and is armed with his rights, and though he be a purchaser at a very low price, yet it was a fair purchase in the regular course of law, and it was owing to the unwarrantable acts of the debtor himself, in throwing a cloud over the title, that his property was thus sacrificed. It does not become the parties to the fraudulent deed to complain of the plaintiff's cheap purchase.

However it may be regretted that the property has yielded but a very small compensation to the creditors, this fact cannot interfere with the question of right. The auction price was an accidental thing, growing out of the peculiar circumstances of this case, and affects only the parties concerned; but whether such a fraudulent conveyance shall stand or fall is a question deeply interesting to the whole community."

This decree was on appeal unanimously affirmed in the court of errors, April 14, 1877, and reported in 14 Johns. 492, where the court, in commenting upon this proposition, says: "The statute, it is urged, protects creditors only from fraudulent deeds, and not a person standing in the situation of the respondent. This proposition is, in my judgment, without any foundation. All the respondent's right to the land in controversy is derived from and under the judgments under which he purchased; the judgments are his title; and he is placed by the judicial sale which took place precisely in the place of the creditors."

In Alabama, North Carolina, and Louisiana the other doctrine has been announced by the courts, some of them on general propositions, and others, especially in Louisiana, by reason of the provisions of local statutes. *Cranston v. Smith*, 47 Mich. 189, is a case exactly in point, which holds squarely the doctrine contended for by respondent. There it was held that the purchaser at an execution sale of the defendant's interest had no equity to file a bill to set aside a conveyance in fraud of creditors, made by him before the date of the judgment. There is no attempt to review the authorities in this case. The court agrees with the contention of the plaintiff that the interest of the defendant sought to be reached is not an equitable one, but as between him and his creditors is the legal title, the object being to set aside a deed alleged to be utterly void as to creditors, and bases its decision on the main question solely, on the ground that such a course would tend to prevent an honest competition at the sale; and in support of that, it cites only a prior state decision (*Messmore v. Huggard*, 46 Mich. 558), which it evidently felt bound to follow. And on the motion for rehearing it reaffirmed its reliance on that case. A consideration of the opinion rendered by Judge Cooley in *Messmore v. Huggard*, 46 Mich. 558, convinces us that the decision in that case was misunderstood, or at least misinterpreted, in *Cranston v. Smith*, 47 Mich. 189. Expressions and opinions of a court must be construed with reference

to the subject-matter under consideration and the principles involved in the case. An investigation of the case cited shows that the statement relied upon by the court had no application to the principles involved in the case which it was deciding, or to the circumstances surrounding it.

In *Messmore v. Huggard*, 46 Mich. 558, the court reaffirms the decision in *Cleland v. Taylor*, 3 Mich. 202, where it was held that the right to question the *bona fides* of any conveyance by the judgment debtor was as much available to the creditor after he had caused the land to be sold on execution and became the purchaser as it was before; but the court distinguished just such a case as the one at bar, so far as the interest sold is concerned, from the case under consideration, by saying: "But the case of *Cleland v. Taylor*, and the other referred to, have little analogy to this. In those cases the judgment debtor had conveyed away his whole interest, and any offer to sell on an execution against him necessarily attacked his conveyance. The judgment debtor would understand this, and his grantee would understand it, and take his measures accordingly. So would all persons who should be inclined to become bidders at the sale understand it, and all would stand on an equality with the judgment creditor in making bids. No doubt it would be proper for the sheriff expressly to give notice at the sale that the validity of the debtor's conveyance was disputed, but as the offer to sell would be idle and meaningless if the conveyance was not contested, any such notice would obviously be unimportant. In this case the situation was altogether different. The judgment debtor had only mortgaged his lands, and an interest remained in him which was subject to execution sale without questioning the mortgage. There is no doubt the judgment creditor might proceed to have this interest sold, and if he might also sell the complete title with the right to have the mortgage annulled afterwards, we must see whether he did the one or the other in this instance. On this point the bill is silent, but the silence itself seems to us altogether conclusive against the complainant's case. It does not appear by the bill that the sheriff in any of his actions questioned the validity of the mortgage; it does not appear that he offered to sell anything beyond the judgment debtor's apparent interest in the land; it does not appear that at the time of the sale anything was said or done that would have apprised Francis Huggard, the mortgagee, that the right to contest the mortgage was involved

in the sale, or that would have given one coming there in the character of bidder to understand that something besides the equity of redemption was being sold. A stranger to the judgment, purchasing under such circumstances, would have purchased the equity of redemption only, for he would have bid for nothing else, and would have offered and paid only what he considered the equity of redemption worth to him. . . . But nothing can be plainer than that, if the judgment creditor could bid with the secret assurance that he was to have an unencumbered title, when others must suppose they were buying subject to the mortgage, this assurance gave him an advantage in bidding to the full amount of the mortgage, and practically put competition entirely out of the question. Not only would this be unfair to other bidders, and for that reason inadmissible, but it would be particularly unfair to the mortgagee. When the sale appears to be of the equity of redemption only, the mortgagee has no occasion to trouble his mind about it; but if he were distinctly notified that it was made in hostility to his mortgage, he might, even if conscious of his good faith, prefer to redeem rather than encounter the risks of litigation. This would be his legal right, and it cannot lawfully be taken from him through a secret understanding between the officer and the creditor, of which he has neither actual nor implied notice."

We feel justified in presenting this extended quotation, for the reason that *Cranson v. Smith*, 47 Mich. 189, is very largely relied upon by the respondent, an authority which, it seems to us, is the most squarely in point in favor of their contention; and that decision seems to be based on a misconception of this case. *Cranson v. Smith*, 47 Mich. 189, was afterwards overruled in the United States circuit court in *Orendorf v. Budlong*, 12 Fed. Rep. 24, where it was also held that the interest of the creditor in the land of his debtor fraudulently conveyed is a legal and not an equitable asset, and it will be observed that was also held in *Messmore v. Huggard*, 46 Mich. 558. *Orendorf v. Budlong*, 12 Fed. Rep. 24, is a well-considered case, in which the inconsistency of the decision in *Cranson v. Smith*, 47 Mich. 189, is clearly shown. Says the court: "But why cannot a purchaser under an execution sale move to have the conveyance declared void? We know of no reason. Clearly the authorities are in his favor. Indeed, the judgment creditor himself, if he purchases at an execution sale, must take proceedings as purchaser, and not as judgment creditor, to at-

tack the conveyance. His rights as creditor are merged in those of purchaser."

And on that proposition is cited *Bump on Fraudulent Conveyances*, 488; *Chandler v. Von Roeder*, 24 How. 224; *White v. Cole*, 24 Wend. 116; *Murphy v. Orr*, 32 Ill. 489; *Barr v. Hatch*, 3 Ohio, 527; *King v. Bailey*, 6 Mo. 575; *Sands v. Hildreth*, 14 Johns. 497. The court further says: "Conceding the rule established in *Messmore v. Huggard* to be correct, it seems to us that the case of *Cranson v. Smith*, so far from being in affirmance of it, is a clear departure from it. We know of no authority which supports the principle announced in that case. None are cited in the opinion, and so far as our researches have extended, none can be found in books."

*Hager v. Shindler*, 29 Cal. 48, is another leading case in which the right of the execution purchaser to bring this action is squarely sustained, and the decision was based on the general powers of a court of equity.

"It is not enough," said the court in that case, "that the plaintiff could have established his title as against the title of Simon Shindler in an action of ejectment. Before the case can be considered as beyond the reach of a court of equity, it must be made to appear that the legal remedy would be adequate and complete. The appeal here is to that branch of the concurrent jurisdiction in which the peculiar remedies afforded by courts of equity constitute the principal ground of jurisdiction. The relief asked is, that certain deeds, alleged to be fraudulent, may be canceled by decree. The bill is brought upon the principle of *quia timet*,—that is, for fear that the deeds may be vexatiously or injuriously used against the plaintiff when the evidence to impeach them may have been lost. The justice invoked is not remedial so much as precautionary or preventive. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can retain it only for some sinister purpose. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title; and it is always liable to be applied to improper purposes. Preventive justice is what is needed, and a court of law has no power to administer it: *Shattuck v. Carson*, 2 Cal. 588."

And so, without further particularly reviewing the authorities cited, or re-citing them in this opinion, we are of the opin-

ion that they overwhelmingly sustain the doctrine that this kind of an action can be sustained by the purchaser at an execution sale. The principal, and about the only real, objection which can be urged against it is the inadequacy of the consideration which is liable to be obtained at the sale, and while it is, no doubt, the purpose of the law that all property which is sold under the process and by authority of the law should bring a fair price, and should not be sacrificed, yet the fraudulent conveyancer is in no position to insist upon a limitation being placed on the rights of others, in order that he may escape the results of his own wrong-doing. The old maxim is, He who asks equity must do equity; and it would seem that no good reason can be shown why there should be a suspension of the rule for his benefit in this character of cases. Mr. Pomeroy, in his *Equity Jurisprudence*, in defining this maxim, says the meaning is, that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adverse party, and growing out of, or necessarily involved in, the subject-matter of the controversy.

A large portion of respondent's brief was devoted to the discussion of the relative meanings of the words "void" and "voidable" as used by the courts, the text-writers, and the law-makers, and what construction and force should be given to these words respectively and relatively. On this subject the authorities are irreconcilably conflicting, and the reasoning is much more conflicting than the decisions, for a review of the cases cited will show that even where the same conclusion is reached, the reasons which sustain the conclusion are conflicting and antagonistic; so that it seems to us that a review or discussion of this question in the light of the cases cited would be unprofitable. Suffice it to say, that under the common law, as well as under our own statute (and our statute, while it is stripped of some of the verbosity of the English statutes, plainly enunciates the same rule), as between the creditor and fraudulent conveyancer the conveyance is void. And conceding that it is only voidable, and that something has to be done by the creditor to change it from a voidable into a void conveyance, that something in this case has been

done, and the plaintiff avoided it by issuing execution, and levying upon and selling the land by virtue of that execution as the property of the judgment debtor, and if it was a fraudulent conveyance it then became absolutely void, and the legal title and right to the land became vested in the purchaser, and having such right and title, he has a right to the interposition of a court of equity to remove any cloud that interferes with the free and perfect enjoyment of his rights.

In this case there are no facts to consider, as the case is here on a demurrer to the complaint, and under the well-known rule that whatever is properly pleaded is conceded to be true by the demurrer, we discuss the case from the standpoint of actual fraud on the part of the judgment debtor and his grantees, and of the legal sale and conveyance to the plaintiff. We do not see the application of the discussion on the subject of liens with reference to the filing of transcripts of judgments to this case. The recording laws are made for the purpose of giving constructive notice where actual notice was impracticable or impossible, and it has been uniformly held that he who is shown to have actual notice will not be allowed to take any advantage of the lack of constructive notice. Any other rule would be so manifestly unjust and inequitable that it could not be entertained for a moment. In this case it is assumed that these conveyances were fraudulent, and that the parties to the transaction were all parties to the fraud; and if that be true, they had no right to notice of any kind, and the lien laws have no application to them whatever. There are no innocent purchasers here demanding protection; there are no other creditors, as there were in *In re Estes*, 6 Saw. 459; and the position taken by Judge Deady in that case, it seems to us, instead of refuting, clearly sustains appellant's contention; and he expressly distinguishes *Hager v. Shindler*, 29 Cal. 48, which is a parallel case with the one at bar, from the case which he had under consideration, which was a contest between the creditors. Speaking of that case he says: "But it does not appear that any question concerning the operation or effect of the lien of a judgment arose or was decided in *Hager v. Shindler*. That was a case where the purchaser of real property, at a sheriff's sale, upon an execution to enforce a judgment against one who had, prior to the judgment, conveyed the premises in question in fraud of his creditors, brought a suit to annul such conveyance as as a cloud upon his title, and the court held that the suit

could be maintained. Nothing was claimed under or by virtue of the lien of the judgment. Indeed, the statement of the ruling in *Hager v. Shindler*, by the court in *In re Beadle*, shows this. It is: 'In that case it was held that the purchaser of land at a sheriff's sale may maintain a bill to set aside and annul, as a cloud upon the title, a deed of the land given before the judgment by the judgment debtor without consideration, and to defraud creditors.' And the subsequent cases of *Ferris v. Irving*, 28 Cal. 646, and *Stewart v. Thompson*, 32 Cal. 263, referred to by the court, and particularly the concurring opinion of Judge Sawyer in the latter case, are only to the same effect, that the conveyance is void as to the creditor, who may attack it and divest the grantee of his right under it by a sale upon an execution against the grantor in favor of such creditor. To justify this conclusion, it was not necessary that there should be any judgment lien in the case, or even that the judgment should ever have been docketed. The seizure and sale upon the execution was a direct and legal assertion of the creditor's right to treat the conveyance as void, and the conveyance by the sheriff to the purchaser invested the latter with the title to the premises, and these California cases only decide that the purchaser, as such, and as the successor in right of the judgment creditor, could maintain a suit to set aside the fraudulent conveyance, as a cloud upon this title, without first bringing ejectment for the possession."

So that it will be seen that in Judge Deady's opinion there were no legal barriers to the invocation of the remedy sought here in this kind of a case; and an examination of the many authorities cited by the learned judge, and his comments upon them, shows that this distinction was maintained almost universally, notwithstanding mere remarks of the different courts, which, if detached and considered without reference to the circumstances of the particular case decided, might seem to warrant a different interpretation. And this same distinction was kept in mind by Justice Field, who affirmed the judgment of the court on appeal to the circuit court. Says Justice Field: "The question for discussion is, whether the judgment creditors acquired by their judgment a lien upon the real property of Estes, so as to entitle them to assets in preference to other creditors."

But it cannot be gathered from either of the opinions in the above-entitled case, or from the cases cited, that the parties



to the actual fraud can invoke the aid of the lien laws, or that the creditor, stated negatively, cannot avoid the conveyance by moving against the land fraudulently conveyed, by levy and sale.

It is also contended by respondent that it is not alleged in the amended complaint, or elsewhere, that the plaintiff has any valid interest in, or right to, the possession of the land in question, and that these are essential requirements in an action to quiet title. While it is not alleged in so many words that the plaintiff has a valid interest in or right to the possession of the lands in question, conceding the matters stated in the complaint to be true, it would be hard to escape the conclusion that she did have a valid interest in the land. If the facts stated show the interest, that is sufficient; the allegation of interest, outside of facts, would amount to nothing more than pleading a conclusion of law. Under our statute, it is not necessary that the plaintiff must be in possession to maintain an action to quiet title. This was decided in *Spit-hill v. Jones*, 3 Wash. 290, and in *Jackson v. Tatebo*, 3 Wash. 456, at this term of court.

On the fourth proposition discussed in plaintiff's brief, however, viz., that the conveyance cannot be impeached as fraudulent, unless it be shown by distinct averment in the complaint that the debtor had no other property subject to execution at the time the conveyance was made, we are inclined to think that the weight of authority and the better reasoning is with the respondent. It is true that the cases cited by respondent fall within the class of cases where the judgment creditors are seeking, by aid of creditors' bill, to subject the property conveyed to the payment of the debts of the various creditors, or where the judgment creditor, after execution has been returned *nulla bona*, has levied upon the property fraudulently conveyed, and moved to set aside the alleged fraudulent conveyance, and subject the property seized to sale under the execution issued. And it is also true that there are a few cases, notably *Hager v. Shindler*, 29 Cal. 48, that undertake to distinguish between that class of cases and the one at bar, but the argument is not a convincing one to us, and we are unable to see the difference in principle. It seems to us that the same reasons attach equally in both cases. The only theory upon which a court of equity would interfere in the first class of cases is, that there is no adequate remedy at law; but if the debtor had other property out of which he could

collect his debt he would have an adequate remedy at law, and it would be difficult to establish the fact that the conveyance was fraudulent, and that it was done for the purpose of preventing creditors from collecting their debts, without showing at the same time that the debtor had no other property subject to execution. To assert that the conveyance was made for the purpose of defrauding creditors, while at the same time the debtor had other property out of which the creditor could make his debt, would be an inconsistent statement. And the fraudulent conveyance is the fact that must be established, or the plaintiff cannot recover in this case, just as it was the fact that had to be established when the action was brought in the nature of a creditor's bill; and the proof necessary to establish that fact must be just as convincing, and the allegations under which the proof can be made just as clear and distinct. It seems that this is the main test of the fraudulency of the conveyance; to hold otherwise would be to hold that every voluntary conveyance, or conveyance without consideration, must be held *prima facie* fraudulent. If a man saw fit to make a voluntary conveyance to his wife or child, or to any one else, it does not concern his creditors if he still have property left sufficient to satisfy their just and legal demands; and if, at the time of the sale of this land by law, he had other property out of which the plaintiff could have collected her debt, she could not then be heard to complain of this conveyance. And there is no more reason why she should be heard now, or why the relative positions of the parties with respect to this question should be changed.

In *Sands v. Hildreth*, 14 Johns. 493, the court seems to base its judgment on the theory that such showing is a matter of defense, and that the burden of proof was upon the defendant, but we see no more reason for shifting the burden of proof in this class of cases than in the class of cases where it is almost universally held that insolvency must be pleaded and proven; and it seems to conflict with the general proposition of law, that where fraud is alleged it must be proven, and that the burden will not be placed upon the defendant to prove affirmatively that the transaction was without fraud. In *Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351, the court, after announcing the doctrine as claimed by appellant, adds: "We do not mean to say that every voluntary conveyance is a fraudulent one within the meaning of the statute. The plaintiff making a levy on the property undertakes the responsibility

of showing that, upon the circumstances of the particular case, the transaction is one which the law will not sanction."

But it seems that, so far as the plaintiff's interests were concerned, it was no matter what the particular circumstances of the case were, provided there was sufficient other property left to apply on his debt. This was the particular circumstance which was necessary to be proven. No creditor has any right to ask a court of equity to interfere in his behalf, to the end that he shall have his judgment satisfied out of the proceeds of some particular property of his debtor. It may be added, however, that in the case just cited there had been no sale of the property, as in this case. That was a case where the property had been levied upon, and the proceeding was to set aside the fraudulent conveyance, and to subject the property seized to sale under the execution. This decision is in the teeth of the uniform decisions, and is the case described by appellant as the second method of procedure, and where, according to his own statement in his brief, "the essential allegation of such a case is the issuance of the writ of execution and the return *nulla bona*." *Pulliam v. Taylor*, 50 Miss. 551, decides that the jurisdiction of a court of equity is ample as before or after sale to set aside a fraudulent conveyance, and we are not able to find that they passed at all on the question now under consideration, unless it may be inferred from the fact that they founded their decision on the question involved, viz., the right of the party to set aside the conveyance, after sale on the particular ground that the statute of frauds denounces absolute nullity upon this character of conveyance, made with intent to hinder, delay, or defraud creditors, and that, so far as the judgment creditor is concerned, it is as though the conveyance had never been made. In *Harrison v. Kramer*, 3 Iowa, 543, and which completes the list of cases cited by appellant on this point, all that is decided is, that the judgment debtor, if he saw fit, may sell the fraudulently conveyed property under his execution, and bring his action afterward to quiet the title, and that in such a case it is not necessary to have a return of *nulla bona*. But it is not decided that the question of insolvency need not be put in issue in any manner in such a proceeding, and this was the construction afterward placed upon that case by the supreme court of Iowa in *Pearson v. Maxfield*, 51 Iowa, 76, which was a case like the one at bar, where the execution purchaser brought an action to set aside the conveyance on the ground of fraud to creditors.

Said the court: "If, at the time of the issuance of the execution, the execution debtor had other property out of which the execution could have been satisfied, the plaintiff should have levied upon such property instead of upon the property in question, which could be effectually reached only through the aid of a court of equity. It is usual, as preliminary to a levy upon property alleged to have been fraudulently conveyed by the execution debtor, to have a return of execution 'no property found.' It has sometimes been thought that this is absolutely necessary, but it was held in *Postlewait v. Howes*, 3 Iowa, 365, and *Gordon v. Worthley*, 48 Iowa, 429, that the fact of insolvency may be proven in other ways. But no case has gone so far, we think, as to hold that all proof of insolvency can be dispensed with. The action of *Gwyer v. Figgins*, 37 Iowa, 517, was brought by a creditor to set aside a conveyance as fraudulent, and was reversed upon the ground, among others, that the debtor's insolvency was not proven. The appellant insists that there is no evidence in this case that the execution debtor was insolvent, and we think the point is well taken. No evidence is pointed out by the appellee, and we have failed to discover any."

Of course, if it is necessary to prove insolvency, it is necessary to allege it, as the defendant has a right to prepare his defense with reference to the allegations of the complaint. Believing that no substantial distinction can be made, so far as this question is concerned, between a case that is brought before and a case that is brought after sale, and believing further that in the absence of some other reason for a digression, that it is better to have a uniform practice in all this character of cases, regardless of which particular proceeding is adopted by the creditor, we decide that this kind of an action cannot be sustained without an allegation and proof that there was no other property of the judgment debtor at the time of the conveyance out of which the creditor could satisfy his judgment or claim, and that therefore the complaint does not state facts sufficient to constitute a cause of action.

The eighth ground of defendant's demurrer is, that the cause of action is barred by the statute of limitations; it being an action for relief on the ground of fraud, it falls within the provisions of the twenty-eighth section of the code, which requires such action to be brought within three years, or else that it falls within the provisions of section 33, which requires the action to be brought within two years from the time the cause

of action accrued. But we are of the opinion that this kind of an action does not fall within the provisions of either section referred to. It is not an action for relief upon the ground of fraud within the contemplation of section 28. That section we think has reference to suits by parties to contracts who are asking to be relieved from contracts that they were fraudulently induced to make, as where a deed has been fraudulently obtained, and suits of that character where fraud is the substantive cause of the action. But in this case the alleged fraud is only an incident; the deeds have been treated as fraudulent, and that fact was assumed by the sale of the land as between the creditor and the fraudulent conveyancer. As we have before said, the fraudulent deed conveyed nothing, and was rendered absolutely void by the levy and sale; and the title was vested in the purchaser by the sheriff's deed; and as was said by the court in *Hager v. Shindler*, 29 Cal. 48, the purchaser had then for the first time a title to be clouded, and "her right to bring her action does not antedate the facts in which it had its origin." It cannot be concluded that an action to remove a cloud falls within the statute of limitations for actions for relief upon the ground of fraud, for there may be clouds upon the title without the aid of fraud. "Hence," as was said by the court in *Stewart v. Thompson*, 32 Cal. 260, "fraud is a false quantity when we come to assign an action of this character to its proper class under the statute of limitations." In this case the plaintiff is the owner of the land; she has title to the land, and she alleges that this title is clouded by fraudulent deeds which are on the record. Judge Sawyer, in a clear and convincing concurring opinion in *Stewart v. Thompson*, 32 Cal. 260, says: "After obtaining his sheriff's deed, he was in a position to recover possession of the land, notwithstanding the fraudulent conveyance, without first procuring its cancellation in equity. It was only necessary to prove the fraud when the fraudulent deed should be set up in the action at law to recover the possession."

Under the statute, an action for the recovery of the possession can be commenced within ten years. We think, therefore, that the action is not barred, though we do not now decide that an action to remove a cloud would be even subject to that limitation, or subject to any limitation at all; for as ten years had not elapsed between the time the purchaser received her deeds to any of these lands and the time of the commence-

ment of this action, it is not necessary to discuss the subject of limitations further.

We have examined all the other points raised by the demurrer, and without discussing them specifically, find that they cannot be sustained. But the point last discussed we think well taken, and on that ground the demurrer will be sustained.

The judgment is therefore affirmed.

STILES, J. Within the time allowed for filing a petition for rehearing the appellant moves to modify the judgment of this court by remanding the case to the superior court, with leave to appellant to amend her complaint herein, to avoid the holding that the insolvency of the fraudulent debtor must be pleaded, upon the ground that the question upon which this court affirmed the decision of the superior court was raised for the first time in this court, and was not suggested, raised, or argued in the superior court. The object of this motion was avowedly to avoid the delay incident to the bringing of a new action; and the method taken to advise us as to what matters were and were not passed upon by the superior court is by filing an affidavit showing the briefs used on the argument of the demurrer, and the opinion of the court in deciding thereon. We do not think the practice here proposed can be acceded to. The judgment below was, that the complaint be dismissed, and we have affirmed that judgment. It is therefore ended, and there would be no propriety in allowing amendments now. The motion, if granted, would require a reversal of the judgment to make it of any avail, which we cannot do upon the grounds stated in the opinion. Upon our own motion, however, we think we should modify the judgment here, as well as that in the superior court, by providing that the dismissal be without prejudice to a new action by the appellant authorized by law.

The motion will be denied, and the judgment modified as above suggested.

HOTT, J. I concur in modifying the judgment as stated in the above opinion, but dissent from that portion of such opinion as holds that the motion should be denied, as I think that it should be granted.

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QUIETING TITLE: See note to *Lewis v. Lichty*, ante, p. 33.

THE DOCTRINE OF THE PRINCIPAL CASE IS REPUDIATED IN ALABAMA: See *Teague v. Martin*, 87 Ala. 500; 13 Am. St. Rep. 63; but the court was not unani-

mous either in that case or those which it followed; and though several states have adopted the same rule as Alabama, the weight both of authority and reason is undoubtedly in favor of the granting of relief under these circumstances. In *Shaw v. Dwight*, 27 N. Y. 244, 84 Am. Dec. 275, the principle was applied to the case of a judgment creditor who had no title to the land, but only a general lien by judgment; and in *Perham v. Haverhill Fibre Co.*, 64 N. H. 485, it was held that a mere attaching creditor might maintain a bill to remove the cloud of a tax deed upon the real estate attached.

ACTION TO REMOVE CLOUD ON TITLE is not within the general statute of limitations and barred by the lapse of six years, as being an action for relief on the ground of fraud: *Bausman v. Kelley*, 38 Minn. 197; 8 Am. St. Rep. 661. But the right to relief may be barred by laches: *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584; 13 Am. St. Rep. 72.

## HAWKINS v. FRONT STREET CABLE RAILWAY CO.

[3 WASHINGTON, 562.]

**HUSBAND AND WIFE — INJURY TO WIFE — PARTIES.** — An action for an injury to a wife, caused by the negligence of a third person, must be brought in the name of her husband; and the wife is a proper, although not a necessary, party plaintiff.

**HUSBAND AND WIFE — INJURY TO WIFE — MEASURE OF DAMAGES.** — In an action by a husband and wife jointly to recover for an injury to her, caused by the negligence of a third person, the measure of damages is compensation for the injury and its subsequent consequences, her pain, suffering, and wounded feelings, the cost of her nursing, medical attendance, and medicines, and the value of her loss of services in the household.

**STREET-RAILWAYS — ACCIDENT AS EVIDENCE OF NEGLIGENCE.** — The fact that a passenger on a cable-car in a city is injured without fault of his own does not raise a presumption of negligence, casting the burden of proof on the railway company to disprove it.

**STREET-RAILWAYS — PASSENGER ON DUMMY — CONTRIBUTORY NEGLIGENCE.** A passenger who takes a seat on a dummy-car of a cable-railway, when he can sit on the inside of the car with safety, is not guilty of contributory negligence. A passenger on the dummy has the same right to be protected against the negligence of the company's servants as a passenger inside the car.

**NEGLECTANCE — DAMAGES FOR DEATH OF CHILD EN VENTRE SA MERE.** — In an action to recover for negligent injury to a woman pregnant with child, she cannot recover for the premature birth and death of the child as a result of the injury, but she may recover for her suffering and impaired health resulting from such death, if due to the injury received by her.

*J. C. Haines*, for the appellant.

*Ralph Simon, and Allen and Powell*, for the respondents.

**STILES, J.** This was an action by husband and wife for damages resulting from injuries inflicted upon the wife through

the negligent acts of appellant's conductor and gripman while she was a passenger on its street-car. She occupied an outside seat on the dummy, at the side and near the front. At a certain place the railway track was blocked by a grocer's delivery wagon, the driver of which refused to move out of the way until the dummy came to a stop within a foot or two of the rear end of the wagon. After the gripman had called upon the wagon driver to move on, the conductor told the gripman to move the car up and hit or push the wagon. The gripman obeyed the directions and struck the wagon a light blow, when the driver of the wagon whipped up his horse and drove down the street, still occupying the railway track, the dummy following closely after, and perhaps still pushing the wagon. They proceeded thus for about three hundred feet, when suddenly the driver turned his horse sharply to one side, for the purpose of entering a cross-street, and the dummy coming immediately behind crashed into the rear end of the wagon, and upset and broke it. Some portion of the wagon, said to be part of a broken wheel, fell upon Mrs. Hawkins, and injured her. The complaint contained allegations of damages as follows: "Whereby and by reason of which said plaintiff's (Mrs. Hawkins's) body was greatly bruised and injured, causing this plaintiff to suffer great pain of body and anguish of mind, and was by reason thereof confined to her bed under the care of a physician, and prevented from attending to her household duties, as also her business and employment, to wit, that of bath tender, for a long space of time, to wit, ten days, and thus prevented from earning her salary of two dollars per day; and this plaintiff, the said George Hawkins, the husband of said Marie Hawkins, was deprived of the society, services, companionship, and solace of his said wife, and was compelled to and did incur large expense and outlay, both of time and money, in attending to and curing his said wife as aforesaid, whereby he was damaged in a large sum, to wit, one thousand dollars; that at the time, to wit, the twenty-sixth day of May, 1890, when the said defendant corporation, by its carelessness and neglect as aforesaid, caused the injury aforesaid, the plaintiff Marie Hawkins was *enceinte*, and that the injury to her body as aforesaid, caused by the collision aforesaid, was of such a severe character that it caused the death of the child with which the said plaintiff was then and there *enceinte* as aforesaid, and since the filing of the second amended complaint and the answer thereto herein, to wit, on October 5,



1890, the plaintiff Marie Hawkins lost the said child, and by reason whereof the said Marie Hawkins suffered great pain in body and distress of mind in giving birth to the said child dead, and in the loss of the said child; and these plaintiffs were compelled to and did expend large sums of money in curing the said Marie Hawkins, and suffered other damages therein."

The case was commenced within a few days after the injury occurred, and originally charged no damage accruing later than ten days from May 26th, but subsequent to October 5th the last paragraph was added as a supplemental complaint.

The first error complained of relates to the husband's alleged damage. The defendant requested the court to charge that the fact that the husband was joined as a plaintiff in the action gave him no right to recover any damages on his own account for loss or injury sustained by him. This request was refused, and the court charged instead: "If the jury find for the plaintiffs, and if they find that by reason of the injuries of the wife, Marie Hawkins, the husband, George Hawkins, was deprived of the ordinary benefit of his wife's services, then the jury may, in computing the damages, take into consideration a fair compensation of such loss caused by the wife's injuries."

At common law, when a wife was injured through the tort of a third person, the injury and the right of action were hers, but she could not sue unless her husband, if living, joined her as plaintiff. The recovery in that case was the pecuniary measure of her own injury and suffering in body and mind. But there was another element of damage which could be recovered only by her husband suing alone in a separate action, viz., his loss of her services and his outlay in restoring her to health. In this case the complaint seems to have been based upon the idea that he could also recover for the society, companionship, and solace of his wife; but we do not understand these to be recoverable injuries. As matter of fact, unless death ensues, the husband is not deprived of either, although his enjoyment of them may be lessened by the knowledge of his wife's suffering. They are of those sentimental, intangible injuries which the law cannot measure. Even in case of death they are not elements of damage: 2 Thompson on Negligence, 1289; *Commissioners of Howard Co. v. Legg*, 93 Ind. 523; 47 Am. Rep. 390. The departure from the common law has, in the most of the states, been in the direction of securing to the wife the right to sue alone for injuries to her, and giving her

the fruits of her action as her separate property. In others, as Wisconsin (Rev. Stats., sec. 2680), husband and wife may recover in the same action for all the injuries to both, in case of a tort committed against her.

The instruction requested by the appellant was based upon the common-law rule, and would have been a proper instruction were the common law in this particular in force here. But inasmuch as the right to sue for a tort which one has suffered is a chose in action, and therefore property, in those states where, as here, all property acquired by either spouse, otherwise than by gift, bequest, devise, or descent, is common or community property, this chose in action is suable by that member of the community who has the disposition of the community personalty. So in Texas, it is held that the wife is not either a necessary or a proper party to an action for an assault committed upon her: *Ezell v. Dodson*, 60 Tex. 331; *Gallagher v. Bowie*, 66 Tex. 235. And in California the husband is held to be a necessary party, since he has the management and power of disposition of the right to damages as part of the common property: *McFadden v. Santa Ana etc. R'y Co.*, 87 Cal. 464.

Our statutes are substantially the same in this respect as those of Texas and California, and we see no reason why we should not follow the decisions of those states. In this case, therefore, the husband was the only necessary party, though the wife, by section 7 of the code of 1881, is a proper party; and in this action all of the damages naturally flowing from the injury complained of are recoverable. The first element of these to be considered is that directly connected with the person of the wife, — the injury and its subsequent consequences, whether permanent or temporary, and her pain, suffering, wounded feelings, etc.; next the cost of her nursing, medical attendance, and medicines, which, although they could at common law be recovered by the husband alone, are with us presumptively expenses incurred and paid by the community; and lastly, the loss of the wife's services in the household. Under this ruling, it is apparent that the instruction asked by the defendant was properly refused, and that given by the court as above was substantially correct.

The second point made by appellant is, that the court erred in instructing the jury thus: "It is the law that where a passenger, being carried on a train, is injured without fault

of his own, there is legal presumption of negligence, casting upon the carrier the burden of disproving it."

Such is not the law as laid down by very numerous authorities. The language of the charge in question was apparently taken from Cooley on Torts, 2d ed., 796, where it is quoted with approval as being well said in a Pennsylvania case. There follow several lines in the text, however, which qualify the quotation, and make it clearly the law when applied to the cases intended to be covered by it. These additional lines are also taken from the Pennsylvania case, but without credit by quotation. The case was *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581, where the exact language is: "*Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control, as a part of its duty to carry the passenger safely; but this rule of evidence is not conclusive."

No case cited to us, or that we have been able to find, goes further than this: See Patterson's Railway Accident Law, c. 6, pp. 438 et seq. In *Federal Street etc. R'y Co. v. Gibson*, 96 Pa. St. 83; a passenger on the street-car of a railway company was struck and injured by a passing load of hay. The charge of the trial court was, that if plaintiff was without fault, he was entitled to recover, unless the defendant satisfied the jury, by the weight of evidence, that the injury arose from an accident which could not be prevented by the utmost skill, foresight, and diligence on the part of the driver. Held, error; and the court said: "It is true, in many cases, that mere fact of injury to a passenger raises the presumption of want of care on the part of the railroad company. Such is the case when the injury results from defective track, cars, machinery, or motive power. Here there was no privity between the company and the driver of the wagon. . . . We see nothing in the case which relieved the defendant in error from proving negligence, or that threw on the company the burden of disproving it."

Applying the just rule thus laid down to the case at bar, we do not see how the charge given by the court, even had it been modified as quoted from *Meier v. Pennsylvania R. R. Co.*, 64 Pa. St. 225, 3 Am. Rep. 581, could have been pertinent. The

nature of the accident was not such as to warrant saying anything about the machinery, and the question whether the servants of the appellant violated any duty to Mrs. Hawkins in allowing the dummy to run so close behind the wagon as to touch or push it, so that when the wagon was turned into the side-street by the driver it was upset, was the very question which the jury was to decide upon the proofs. They were to say whether, under all the circumstances, there was negligence in so running the car at the rate of speed at which it traveled, or in not stopping the car when the wagon slackened its pace in turning out. But if the fact of injury was to determine the negligence *prima facie*, the jury would naturally stop its consideration of the other questions, and look to the defendant's evidence to see whether there was anything to negative the presumption declared by the court. For this error the case must be reversed. But there are some other matters which it is necessary to advert to in view of another trial.

The appellant claims contributory negligence on the part of Mrs. Hawkins in taking a seat on the outside of the dummy when she could have sat safely on the inside of the trail car. This we cannot support. The seats on the dummy were for passengers, and any one sitting there had the same right to be protected against the negligence of the company's servants as though he had sat inside.

The original claim in this case was for special damage to a dress worn by Mrs. Hawkins, in the sum of twenty-five dollars, twenty dollars for loss of her earnings as a bath tender, and three thousand dollars general damages. But by the third amended and supplemental complaint, filed after the delivery of her child, the demand was raised to twenty-five thousand dollars. We can see no reason for this very great increase in the alleged damage, unless it was upon the theory that if the death of the child could be shown to have been caused by the injury to its mother, that fact would be ground for an enhancement of the damage. Nor can we, upon any other theory, account for the vast amount of medical testimony adduced to show that the death of the child some three weeks before its delivery was attributable to the blows and fright inflicted upon Mrs. Hawkins four months and nine days before its delivery. Had this testimony been coupled with any attempt to show that in giving birth to the child the mother had suffered any unusual pain or illness, or that by the death of the child, and her subsequent carriage of it for several weeks in that condition,

she had been subjected to extraordinary distress of body or mind, we might discern some purpose in it. But it is admitted that the mere loss of the child by its death *en ventre sa mere* is not a recoverable damage, and for aught that appears, there was no perceptible difference in the amount of pain and illness attending the delivery of the child dead from what there would have been had it been alive. It may have been imagined that there would be, but there was no testimony that there was. It appeared that the child, on May 26th, must have been at least four months advanced. On that day the accident occurred, after which Mrs. Hawkins went home without assistance. She was immediately attended by a physician, who found symptoms of miscarriage. But after about ten days of quiet and treatment, the danger apparently passed away, and she resumed her accustomed household duties, using great care and caution, however, against any imprudence which might bring on the dreaded miscarriage. She continued somewhat nervous and anxious, and suffered some pain and had some faint spells; but the child was alive, and remained so until a certain time some four weeks before October 5th, after which no signs of life were observed. No physician was summoned until the day of her delivery, and the confinement lasted some fourteen hours. It was about two months later before she could resume her household duties. Previous to the accident she was a healthy woman, and had none of the symptoms described.

Upon these summarized facts, the jury was to find what pecuniary injury the plaintiffs suffered from the tort committed against Mrs. Hawkins, not in any sense against the child. Cases are cited to show that damages have been recovered for a miscarriage: *Shartle v. Minneapolis*, 17 Minn. 808; *Barbee v. Reese*, 60 Miss. 906; *Brown v. Chicago etc. R'y Co.*, 54 Wis. 342; 41 Am. Rep. 41. But in all such cases it will be found that the recovery was for the ill-health and suffering attendant and consequent upon the miscarriage, and not in any sense for the loss of the child. In this case, however, respondents' own medical experts say there was no miscarriage, but a premature birth, caused by the death of the child from insufficient nourishment, referable probably to the injury and fright occurring to the mother in May previously. Now, time is not considered in establishing liability for injuries, except that when what are claimed to be effects of an injury appear at a period remote from the injury the proximate cause is more difficult to prove. And so we have no doubt that if Mrs. Haw-

kins shows impairment of health and suffering growing out of the death and premature birth of her child, which would not have attended its birth at the usual time either alive or dead, and also that the child's death is attributed to a negligent injury which she received, respondents can recover for her suffering and impaired health. But she must show the injury by appropriate evidence, and the mere proof that the child died, and was prematurely delivered, as a result of the accident, would not be sufficient to presume substantial damage therefrom.

We are led to say this much from a belief that from the way the case went to the jury, the death of the child probably occupied a large place in its calculations, and tended to cause the return of a somewhat excessive verdict, upon the showing of actual damage; though we do not wish it understood that if the size of the verdict were the only ground of objection, we should on that account reverse the case. It is matter of common knowledge that every woman who is *enceinte*, and particularly one who is so for the first time, is more or less prone to nervousness and anxiety, as well as that the travail of childbirth is a time of suffering, illness, and danger, so that it is not just to impose upon the merely careless tort-feasor, without previous knowledge of her condition, liability for more of her trouble than he has actually caused.

Judgment reversed, and cause remanded for a new trial.

#### HUSBAND AND WIFE, JOINDER OF, IN SUITS FOR PERSONAL INJURY TO HER.

— The common-law rule was, that both husband and wife must join in a suit for damages for personal injuries to the wife: *Ballard v. Russell*, 33 Ma. 196; 54 Am. Dec. 620. This rule has been modified in most of the states by the various statutes affecting the marriage relation. In some jurisdictions, as in New York, a wife may sue alone: *Bennett v. Bennett*, 116 N. Y. 584. The same rule prevails in Indiana, Alabama, and perhaps in the greater number of states. Recent cases illustrating this view are *Portland v. Taylor*, 125 Ind. 522, and *Barker v. Anniston etc. R'y Co.*, 92 Ala. 314. In Maryland it has been held that a wife cannot sue alone under a statute providing that she "may sue in any court of law or equity, upon any cause of action, in her own name, and without the necessity of a *prochein ami*, as if she were a *feme sole*," for the reason that this clause only gives her the right to sue upon any cause of action arising out of "the business, occupation, or enterprise" in which she is allowed to engage: *Wolf v. Bauereis*, 72 Md. 481. On the other hand, in those states in which the doctrine of community property has been adopted, it is held, as in the principal case, that since the husband has the right to dispose of the money recovered in damages, he is the proper party plaintiff in such actions. Recent cases on this point are *Neale v. Depot R'y Co.*, 94 Cal. 425; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772. A corol-

lary to this doctrine is, that the contributory negligence of the husband is imputed to the wife: *McFadden v. Santa Ana etc. Street R'y Co.*, 87 Cal. 464; *Missouri Pac. R'y Co. v. White*, 80 Tex. 202.

**INJURIES TO WIFE.** — DAMAGES FOR A PERSONAL INJURY may include reasonable compensation for pain and suffering, as well as the expense of medical attendance and the loss of time consequent upon confinement: *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; 98 Am. Dec. 229. Where a husband sues alone for his own benefit, he may recover for the loss of his wife's services: *Citizens' R'y Co. v. Twinnane*, 121 Ind. 375; and the same rule prevails where the husband sues in behalf of the community: *Texas etc. R'y v. Burnett*, 80 Tex. 536. But where a wife is allowed to sue alone for damages, she cannot recover for the loss of her own services. Such damages can be recovered only in a separate action brought by the husband in his own name: *Blaschinski v. Howard Mission*, 130 N. Y. 497.

**THE PRESUMPTION OF NEGLIGENCE** raised by the happening of an accident is discussed in the extended note to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490-495. The more recent case of *Birmingham etc. R'y Co. v. Hale*, 90 Ala. 8, 24 Am. St. Rep. 748, states the rule thus: Mere proof of injury does not raise a presumption of negligence against the accused sufficient to impose on him the burden to prove due care on his part. In order to recover, plaintiff must show an accident from which the injury resulted, or circumstances of such character as impute negligence.

**DEATH OF CHILD BEFORE BIRTH**, and grief occasioned thereby, are not elements of damages in an action for personal injuries to a wife. But evidence that the child was still-born may be admitted, if that fact tends to show that her labor was thereby prolonged, and her suffering increased: *Western Union Tel. Co. v. Cooper*, 71 Tex. 507; 10 Am. St. Rep. 772.

## IN RE PERMSTICK.

[3 WASHINGTON, 572.]

**JUDGMENT ON UNAUTHORIZED FINDING OF JURY IS VOID.** — A finding by a jury in a criminal case, that the complaint was malicious and without probable cause, in addition to a finding of not guilty, is unauthorized, and a judgment on such verdict, that the complaining witness pay the costs of suit or stand committed to jail until they are paid, is void.

**VOID JUDGMENT.** — **HABEAS CORPUS** may be maintained for relief against a criminal judgment void for want of jurisdiction, although the judgment defendant has the right of appeal.

*A. J. Hanlon*, for the petitioner.

*James A. Haight and W. H. Snell*, for the respondent.

**STILES, J.** The petitioner is confined in the jail of Pierce County under a commitment of the superior court, which recites that in the case of *State v. Locke* petitioner was the complaining witness; that the jury trying Locke had returned the following as their verdict, viz.: "We, the jury in the above-

entitled cause, do find the defendant, George Locke, not guilty; and we further find that the complaining witness in the cause is Leonard Permstick, and that the complaint was malicious and without probable cause"; and that thereupon a judgment was entered upon the verdict that the petitioner pay the costs of the trial, \$275.85, and stand committed to the jail of the county until payment.

We are of the opinion that this judgment was void, and that petitioner is entitled to his discharge. The judgment is justified by reference to section 2103 of the code of 1881; but an inspection of that section does not bear out the claim asserted under it. The provision there made is applicable only to cases of examinations before committing magistrates. A "charge," a "complaint," and an "examination" are spoken of, which do not apply, in the sense intended, to an indictment or an information, and the proceedings thereunder. It is true that a "judgment or verdict" are mentioned, in which it shall be designated who is the complainant, but in the same clause it is prescribed that the "court, justice of the peace, or other magistrate" shall decide whether the complaint was frivolous or malicious; none of these magistrates find verdicts, and we must suppose the use of the term to have been an inadvertence. Perhaps a better reason, however, why section 2103 should not be sustained in this case is that section 966 was evidently intended by the legislature to cover all criminal cases triable by jury, and two things are at once observed as markedly prominent in that section: 1. That the court, upon failure of the prosecution, is to be satisfied from all the circumstances that the action of the complainant was malicious or without probable cause; 2. That imprisonment until the costs are paid is not a part of the judgment there permitted. The jury in all criminal cases are in the box for but one purpose, viz., to say whether or not the accused is guilty; and in this state that fact is emphasized by a statute (sec. 1103), which prescribes a form of verdict covering but the one alternative, which they must decide.

We do not find it necessary to pass upon two constitutional questions raised here, viz., whether the petitioner had due process of law, and whether he is imprisoned for debt. They will be interesting when occasion arises requiring their discussion.

The petitioner is not estopped to maintain this proceeding by the fact that he might have appealed from the judgment



against him. The writ of *habeas corpus* is allowable in cases where the court which rendered the judgment under which the person is held was not a court of competent jurisdiction; or the party may appeal if he sees fit. It was suggested that the case of *In re Rafferty*, 1 Wash. 382, has some bearing upon this point. But it is not so. In the *Rafferty* case it was sought to have this court inquire into and pass upon the question whether the superior court had jurisdiction of the petitioner's person, that is, whether its proceedings were regular, nothing of which was disclosed by the judgment or could be inquired into on *habeas corpus*. So in the *Lybarger* case, 2 Wash. 131, we were asked to pass upon the question whether the procedure by information was a lawful mode of obtaining conviction, and we there stated the limit of the rule thus: "When the officer returns as his authority for holding a prisoner a commitment which shows upon its face that such person is committed by a court of general jurisdiction, in pursuance of its final judgment for a crime triable by such court, we think he has brought himself within the provisions of our statute, and that the courts are, by the terms thereof, precluded from inquiring further into the cause of detention."

As applied to that case, enough was said; but in this one the qualification that the cause was triable by the court must be extended to cover the condition that the court's judgment was one which, under the law, it had jurisdiction to render. In this case the commitment shows on its face that the prisoner is detained for a cause not recognized by the law as ground for a judgment of imprisonment, and therefore not within the possible jurisdiction of any court. The case of *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, clearly and at length discusses both the question of the right to *habeas corpus* in addition to that of appeal, and that of the competency of courts in such cases.

Let the writ issue, and the petitioner be discharged.

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HABEAS CORPUS — VOID JUDGMENT. — In criminal cases *habeas corpus* may be maintained for relief against judgments void for want of jurisdiction: Note to *Morrill v. Morrill*, 23 Am. St. Rep. 110; compare *McLaughlin v. Hickson*, 127 Ind. 474; 22 Am. St. Rep. 658, and note.

## HOWELL v. CITY OF TACOMA.

[3 WASHINGTON, 711.]

**MUNICIPAL CORPORATIONS — STREET IMPROVEMENT — UNCONSTITUTIONAL ASSESSMENT.** — An assessment for street improvement, based upon the value of the lots fronting thereon, without regard to the frontage or depth of the lots assessed, and which necessarily causes some of them to pay a much greater sum per front foot than others, is unconstitutional and void for want of equality.

**MUNICIPAL CORPORATIONS — STREET IMPROVEMENT — UNCONSTITUTIONAL ASSESSMENT — ESTOPPEL.** — A land-owner who is a petitioner for street improvement, and who fails to avail himself of an opportunity given of appearing and objecting to the proceedings therefor, or to an assessment which is void and unconstitutional for want of equality, is not estopped by the action of the city council in approving the levy.

**MUNICIPAL CORPORATIONS — UNCONSTITUTIONAL TAX FOR STREET IMPROVEMENT — JURISDICTION OF EQUITY TO SET ASIDE WITHOUT TENDER.** — Where a tax levied for a street improvement is void and unconstitutional for want of equality, a court of equity will set it aside and restrain its collection, at the instance of a land-owner against whom it is assessed, without a tender on his part of his proper proportion of the cost of the improvement.

**ACTION** to restrain the city of Tacoma from collecting an assessment for street improvement. Defendants' answer was demurred to, and they appealed from a judgment sustaining such demurrer.

*S. C. Milligan and M. B. Hoxie*, for the appellants.

*Seymour, Griggs, and Lockwood*, for the respondent.

**HOYT, J.** The first question presented by the record in this case is as to the legality of a certain assessment for street improvements, made by the city of Tacoma upon the lands of the respondent. It appears from the record, and from the admissions and briefs of counsel, that such improvement was upon a street situated in the suburban part of said city of Tacoma, where much of the land had not been platted into town lots. The city council, in construing the provisions of its charter, determined that the lots or parcels upon which they were authorized to assess the cost of the improvement were all lots and parcels which had a frontage upon the street improved, and that each of said lots and parcels should bear their ratable proportion of such cost, according to the value thereof, regardless of the question as to the depth of such lots or parcels back from said street, and also regardless of the extent of the frontage thereon. The language of the charter thus construed by the city council, as contained in the laws of 1886, p. 220, sec.

117, is as follows: "Such cost and expense shall be assessed upon said lots and parcels of land in the following manner: The cost and expense of the work done and materials furnished in making the entire improvement shall be assessed upon the lots and parcels of land fronting upon the improved street, highway, or alley within the limits of the improvement thereof, lengthwise of such street, highway, or alley, ratable according to the valuation of each of said lots or parcels of land, exclusive of the improvements thereon, as determined by the last annual assessment thereof for general and municipal taxation, made previous to such assessment of said cost and expense thereon."

And the result, in this case, of such interpretation was, that along some portions of said street the lands fronting thereon extended back less than one hundred feet, while on other portions such lands extended back one thousand feet or more. The consequence would necessarily be, that some of the lands fronting upon the street would pay a much greater sum per foot front than others. The exact proportion of this inequality was not made to appear by the record, for the reason that the cause was determined by the court below upon the pleadings; but from an inspection of such pleadings, and of the map which by consent was considered as properly a part of the record, it was certain that the lands of respondent were burdened with a charge of three or four times as much for each foot of frontage as some other lands situated upon the street. The system or plan of assessing the cost of street improvements upon the lots fronting thereon according to their value, though questioned by many courts, may, for the purpose of this case, be conceded; but it does not follow that assessments thereunder should be sustained which are clearly unequal, any more than under any other system. The basis of all taxation is equality. And no tax of any kind can be sustained when it appears that the several parcels of property properly chargeable with the tax are made to bear unequally the burden thereof. This proposition is almost axiomatic. We would cite, however, upon this point, Cooley on Constitutional Limitations, 5th ed., 620, \*499, and cases there cited. In our opinion, the assessment in question violates this well-settled rule. So far as appears from this record, there was no reason why the lands of respondent, which were situated at a greater distance from the street improved than the limit of the narrowest strip charged with such improve-

ment upon other portions of the street, should have been made to bear any part of the cost of the improvement. And when one of two adjoining strips of frontage is assessed only to the depth of one hundred feet, and the other to the depth of a thousand feet, it is evident to all that such assessment is not equal and uniform. The use of the word "parcels" in the charter of said city must have a more restricted definition than that given to it by said common council. If said clause of the charter is to stand the test of constitutional scrutiny, it must be held to relate only to improvements in such part of the city as have been platted into lots and parcels of substantially equal depth upon the street to be improved, or that under it the common council can establish an assessment district extending back a uniform distance from the street, throughout the entire length of the improvement, and assess only upon the lots and parcels within such district. Whether or not it will stand the test when thus construed, it is not necessary for us now to decide, as this assessment does not meet any interpretation of said clause consistent with its constitutionality: See *Washington Avenue*, 69 Pa. St. 362; 8 Am. Rep. 255; *City of Philadelphia v. Rule*, 93 Pa. St. 15; *Seely v. City of Pittsburg*, 82 Pa. St. 366; 22 Am. Rep. 760.

The tax upon the lands of the respondent was clearly illegal. The appellants, however, contend that even although such is the fact, plaintiff was not in a situation to question it, for the reason,—1. That he was one of the petitioners for the improvement, and must be held to have moved the common council to do what they did, and cannot, therefore, now object; 2. That under the provisions of the charter of said city of Tacoma, the respondent was given the opportunity of appearing and objecting to any of the proceedings, or to the assessment, and not having done so, he is bound by the action of the council in approving of the levy. The provisions of the charter in that regard are broad enough to warrant this contention on the part of the appellants, but such construction would, as in the other case cited, destroy the constitutionality of such provision. If it is to be held constitutional, the conclusiveness of the proceedings had before said city council must be held to apply only to the question of procedure and valuation, under a method which, if properly applied, would work substantial justice. It could not be extended so as to estop one from asserting rights as against such assessment, when the common council had never had any jurisdiction of

the proceeding, or had so far departed from proper methods as to oust it of jurisdiction. In the case at bar, we think that the proceedings clearly show such a departure from constitutional methods as to render them void; and that for that reason, respondent, as a petitioner for the work, is not responsible therefor or bound thereby, and that for a like reason the proceedings before the common council in equalizing and approving the assessment are binding upon no one.

The other objection of appellants as to the proceedings of the court below is, that a court of equity will not set aside a tax nor restrain its collection unless the party seeking the interposition of the court pays, or offers to pay, such proportion of the tax assessed against him as in equity he should. And they claim that in this case the answer showed that the lands of respondent were benefited by the improvement, and that in equity he should pay for such benefit, and that as he has not done so he could not maintain this action. We doubt whether the rule above stated applies to a tax or assessment absolutely void, as we hold this one to be; but even if it does, we think the reason set out in respondent's complaint why he has not paid or offered to pay his proper proportion of the cost of the improvement is a sufficient one. The whole assessment was made upon a basis so false and unwarranted that it furnished no data from which the just proportion of any of the property properly chargeable with the cost of the improvement could be determined. That equity will interfere to set aside such a tax, and to prevent the clouding of the title of the owner, we think clear: See *Mayall v. City of St. Paul*, 30 Minn. 294; *Hassen v. City of Rochester*, 65 N. Y. 521; *Ellwood v. City of Rochester*, 122 N. Y. 229.

Judgment of the court below must be affirmed.

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ASSESSMENTS FOR IMPROVEMENTS should be distributed among the lot-owners by imposing upon each his aliquot portion of the whole cost, estimated according to the extent of his lot on the street: *Louisville v. Hyatt*, 2 B. Mon. 177; 36 Am. Dec. 594. In *Harrisburg v. McCormick*, 129 Pa. St. 214, it was held that when a municipal claim is filed for the cost of street improvements in the built-up portions of cities, assessed upon the front-foot rule, it is no defense against the claim that the property is but a narrow strip along the street, and not worth the amount of the assessment claimed. This case is not inconsistent with the principal one, inasmuch as the opinion of the Washington judge expressly recognizes the application of different rules according to the position of the lots assessed. As to the exercise of the taxing power for local improvements, see note to *New Orleans v. Telephone etc. Co.*, 3 Am. St. Rep. 509, 510.

THE OWNER OF PROPERTY ILLEGALLY ASSESSED, though he knows of the assessment, and that the improvement is being made on the faith of it, will not be estopped, by his silence during the progress of the work, from afterwards disputing the validity of the assessment: *Rector v. Board of Improvement*, 50 Ark. 116.

EQUITY WILL INTERFERE BY INJUNCTION to restrain the collection of an illegal and void special assessment, though there is nothing to show it to be inequitable, and plaintiff will not be required to pay the expense of the work as a condition of relief: *Dean v. Charlton*, 23 Wis. 590; 99 Am. Dec. 206. But the collection of the excess of a merely erroneous assessment will be enjoined only on condition that the correct amount thereof be paid, if clearly ascertainable by computation: *Mills v. Charlton*, 29 Wis. 400; 9 Am. Rep. 579.

INJUNCTION AGAINST ENFORCEMENT OF MUNICIPAL ORDINANCE will not issue at the instance of an individual, unless some question as to the protection of a franchise as to him is involved, or irreparable damage to him is threatened, or the invalidity of the ordinance has been established at law: *Forchimer v. Mobile*, 84 Ala. 126. It may be presumed that on an analogous principle relief would be granted if the ordinance were invalid on the face of the corporate records, for it has been decided that the payment of an assessment levied by such an ordinance is one made under a mistake of law, and cannot be recovered back: *Poeley v. Buffalo*, 122 N. Y. 592.

CASES  
IN THE  
SUPREME COURT  
OF  
CALIFORNIA.

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**CAHILL v. MURPHY.**

[94 CALIFORNIA, 29.]

**SLANDER — DAMAGES FOR MENTAL SUFFERING OF PLAINTIFF AND HIS FAMILY.**

— Mental suffering is an element for which damages may be recovered in an action for slander, and such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family suffer by reason of the disgrace visited upon him or her by the slanderous charge.

**SLANDER — EVIDENCE — NUMBER, AGES, AND DEPENDENCE OF PLAINTIFF'S CHILDREN.** — In an action for slander, evidence of the number and ages of plaintiff's children is admissible on the question of damages; but evidence that they are all dependent upon him or her for support is not admissible on that issue.

**SLANDER — DAMAGES — DISCRETION OF JURY.** — Where the slanderous words, charged in an action for slander, were spoken wantonly and maliciously, the plaintiff is entitled to recover punitive or exemplary damages, and the assessment thereof is almost entirely in the discretion of the jury.

**SLANDER — ADMISSION OF INCOMPETENT EVIDENCE — DEPENDENCE FOR SUPPORT — NON-PREJUDICIAL ERROR.** — In an action for slander, evidence that plaintiff's children are dependent upon him or her for support is inadmissible on the issue of damages; but error in admitting such evidence will not work a reversal of the judgment when the record shows that the jury was not thereby prejudiced against defendant, that the slanderous words were spoken wantonly and maliciously, and that the verdict was not excessive.

*Frank McGowan*, for the appellant.

*J. H. G. Weaver*, for the respondent.

**FITZGERALD, C.** This is an action for slander. The complaint alleges, in substance, that on or about the twenty-first day of September, 1889, and for a long time prior thereto, plaintiff, with her children, occupied certain rooms in a hotel

of which the defendant was owner and proprietor; that one of these rooms was situated on the ground-floor of the hotel, and used by her for the purpose of carrying on and conducting a general merchandising business; that on said last-mentioned date the soot in the chimney leading from the room used as a store became ignited, causing an alarm of fire to be given; and it is further alleged, upon information and belief, that the fire was communicated to the soot in the chimney from a fire in the stove situated in said store.

The slanderous words out of which this action arose are alleged to have been falsely and maliciously spoken by the defendant of and concerning the plaintiff, and are laid as follows: "This is twice you [the plaintiff meaning] have tried to burn us [the said hotel meaning] out to get your fourteen hundred dollars insurance. But I will report you [the said plaintiff meaning] to the insurance company to-morrow morning, and have your insurance taken away from you."

It is further alleged that the defendant, by the use of these words, intended to convey the meaning that the plaintiff willfully and maliciously communicated the fire to the soot in said chimney, and that by so doing she was guilty of an attempt to commit the crime of arson, and that they were so understood by those in whose presence they were uttered, to the damage of plaintiff's character and business in the sum of ten thousand dollars.

A demurrer was interposed to the complaint, which, upon the grounds stated, was properly overruled.

Defendant thereupon answered, specifically denying the material allegations of the complaint, and upon the issues thus joined, plaintiff had verdict and judgment for twelve hundred dollars.

The only error complained of which we deem it necessary to consider relates to the ruling of the court upon defendant's objection to the following question, propounded to plaintiff on her examination in chief as a witness, and after she had testified, without objection, that she had "a family of four children."

"Q. How many of them are dependent upon you for support?"

Objected to, on the ground that the question "is incompetent and immaterial." The objection was overruled by the court, and defendant excepted.

"A. Three are dependent upon me at present."



It is claimed that the effect and purpose of this testimony was to arouse the sympathies and sentimental feelings of the jury, to the prejudice of defendant's case, by the introduction of an element that did not belong to it, and which the jury could not properly consider in the assessment of damages.

In *Rhodes v. Naglee*, 66 Cal. 681, the ruling of the court below, permitting the plaintiff, against defendant's objection, to prove that he was a married man and had a family, was held not be erroneous.

And in *Dixon v. Allen*, 69 Cal. 527, the mother of the plaintiff was allowed to testify as to the number of her children, their ages, and the death of her husband.

The rule laid down by this court in those cases rests upon the principle (although not stated) that as mental suffering entitled the plaintiff to compensation in cases of this character, such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family would suffer by reason of the disgrace visited upon her by the slanderous charge.

It was therefore competent, in this case, on the question of damages, to prove the number and ages of plaintiff's children; but that they were dependent on her for support was irrelevant, and not within the issues raised by the pleadings, therefore erroneous.

But was it such a material error as would justify a reversal?

The rule in this state is well settled, that injury will be presumed from error, unless the record affirmatively shows to the contrary. It was competent, as we have stated, for the plaintiff to prove the number and ages of her children, and if it appeared from the evidence that they were minors, the presumption would be that they were naturally and legally dependent on her for support. The effect, therefore, of such evidence would be the same as if proven by direct testimony.

The evidence upon which the verdict was founded shows that the slanderous words charged were spoken wantonly and maliciously. The plaintiff was therefore entitled to recover of the defendant exemplary or punitive damages, and the assessment of such damages was almost entirely in the discretion of the jury.

In view, therefore, of the enormity of the charge and the situation of the parties, the plaintiff being a defenseless woman, coupled with the amount of damages awarded by the jury as compared with the sum sued for, we are satisfied that the jury

was not influenced by this evidence prejudicially to the defendant's case.

The verdict might well have been for a much larger sum, and yet not obnoxious to the objection that it was excessive. In this case we think the evidence immaterial, and its admission by the court a mere technical error: *People v. Fick*, 89 Cal. 144.

The judgment and order should be affirmed, and we so advise.

TEMPLE, C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

INJURY TO FEELINGS AS AN ELEMENT OF DAMAGES in actions for slander is discussed in *Terwilliger v. Wands*, 17 N. Y. 54; 72 Am. Dec. 420, and note 434, 435; *Republican Pub. Co. v. Mosman*, 15 Col. 399.

THAT THE FEELINGS OF THE FAMILY OF THE SUFFERER FROM A TORT are a proper element in the assessment of damages has been held in actions for seduction: *Emery v. Gowen*, 4 Greenl. 33; 16 Am. Dec. 233; *Stevenson v. Belknap*, 6 Iowa, 97; 71 Am. Dec. 392; and in an action for assault and battery: *Trimble v. Spiller*, 7 T. B. Mon. 394; 18 Am. Dec. 189.

WHERE ACTUAL MALICE IS SHOWN IN AN ACTION OF SLANDER, the jury may always give exemplary damages: *Newman v. Stein*, 75 Mich. 402; 13 Am. St. Rep. 447; *Hess v. Sparks*, 44 Kan. 465; 21 Am. St. Rep. 300; *Duckett v. Pool*, 34 S. C. 311. The amount of such damages rests entirely in the discretion of the jury: *Wimer v. Allbaugh*, 78 Iowa, 79; 16 Am. St. Rep. 422; *Harrie v. Zanone*, 93 Cal. 59.

WORDS IMPUTING THE COMMISSION OF ARSON ARE ACTIONABLE, as where it was said of a person that he burned his own mill to defraud an insurance company: *Davis v. Carey*, 141 Pa. St. 314.

[IN BANK.]

## GOODRICH v. LATHROP.

[94 CALIFORNIA, 56.]

**VENDOR AND VENDEE—CONTRACT TO PURCHASE LAND—RESCISSION FOR MISTAKE.**—A person who, intending to purchase, views the wrong lot, and contracts to purchase without knowledge of the mistake, may rescind the contract upon discovering the mistake, if he can return the property to the vendor in substantially the same condition as if no contract had been made.

**VENDOR AND VENDEE—RESCISSION OF CONTRACT TO PURCHASE LAND—CONSTRUCTION OF STATUTE.**—A statute providing that rescission of a contract for the purchase of land "cannot be adjudged for mistake, unless the party against whom it is adjudged can be restored to substan-

tially the same position as if the contract had not been made," is satisfied if the property can be returned by the vendee in substantially the same condition as when he received it.

**VENDOR AND VENDEE — RESCISSION FOR MISTAKE — DEPRECIATION IN VALUE.** — The right of a vendee to rescind a contract for the purchase of land, entered into through a mistake of fact, is not defeated by the fact that the land has depreciated in market value while out of the possession of the vendor, if the vendee can return the property in substantially the same condition as when he received it.

**VENDOR AND VENDEE — RESCISSION REQUIRING VENDEE TO DO EQUITY.** — Where a vendee is entitled to rescind a contract for the purchase of land because of a mistake of fact, the vendor will be granted such equitable relief in the nature of compensation, in addition to the return of the land, as the nature of the case may require.

**PRACTICE — FINDINGS.** — Where, in an action by a vendee to rescind a contract for the purchase of land on the ground of mistakes of fact, the answer alleges that such mistakes were the result of the negligence of the vendee, and sets out the facts, a finding by the court that "these mistakes were caused by the neglect of a legal duty on the part of the plaintiff," is a conclusion of law, and not a finding of fact, and in the absence of other findings, entitles the vendee to a reversal of the judgment against him.

*C. E. Sumner*, for the appellant.

*H. B. Westerman*, for the respondent.

**GAROUTTE, J.** This is an action by a vendee to rescind a contract of sale of realty, and to recover money paid thereunder, upon the ground that the contract was executed through a mistake of fact. Judgment went for defendant, and this is an appeal from the judgment and order denying a new trial. Plaintiff, knowing that defendant had a certain lot for sale, went to examine the same with a view to purchase, but by mistake looked at a different lot from the one defendant had for sale. She did not see defendant's lot, but the one she viewed being satisfactory, and believing it to be the lot defendant had for sale, she entered into a written contract of purchase with defendant, the description in said contract being for defendant's lot. Later, upon ascertaining her mistake, she gave notice of rescission, and brought this action thereunder. Defendant, by his answer, conceded the mistake, but set out many facts tending to show negligence upon her part in viewing the wrong lot, and also claimed that the lot had largely depreciated in value since the making of the contract, and that consequently he could not be placed *in statu quo*. Under the authority of *Barfield v. Price*, 40 Cal. 542, these facts present ample ground for rescission of the sale, unless the defenses set out by the answer are sufficient to defeat it. As to

these defenses the court found "that said mistakes were caused by the neglect of a legal duty on the part of plaintiff," and also that "defendant cannot be restored to substantially the same position as if the contract had not been made," and upon these findings rendered judgment for defendant. Section 3407 of the Civil Code provides: "Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made." The words "same position," found in the section, are used with reference to the subject-matter of the contract, and the fact that the market value of the property may have depreciated while out of the possession of the vendor does not defeat the vendee's right of rescission. If the property can be returned by the vendee in substantially the same condition as when he received it, then the requirements of this section of the code are fully satisfied. If in equity and good conscience the vendor is entitled to any relief from the vendee by reason of her mistake in the premises, then section 3408 gives the court full power to do what justice may require in the nature of compensation. As has been previously noted, the defendant set out various facts and circumstances tending to show that the mistake of plaintiff was occasioned by her own negligence. In response to these allegations of the answer, the court made the single finding that "these mistakes were caused by the neglect of a legal duty on the part of plaintiff." Conceding that the facts set out by the answer in this regard constitute a good defense to the action, which question we do not decide, yet the finding of the court is a conclusion of law, and can only be considered as such. It follows that there are no findings of fact made by the court upon this defense, and we are unable to determine upon what fact or state of facts this conclusion was based.

Let the judgment be reversed, and the cause remanded for a new trial.

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MISTAKES OF PURCHASER IN SALES OF LAND as to location and description of the premises will entitle him to recovery of purchase-money and a rescission of the contract: *Stille v. McDowell*, 2 Kan. 374; 85 Am. Dec. 590; but a mistake of one party will not entitle him to have the contract reformed so as to subject the other party to obligations which he never intended to assume: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; unless the parties can be replaced in their former position: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816. This rule, that the party from whom relief is claimed must be put *in statu quo* as a condition precedent to the rescission of the contract, is

further sustained by the cases cited in the note to *Bryant v. Isburgh*, 77 Am. Dec. 661.

**MISTAKE OR IGNORANCE OF A MATERIAL FACT** is a ground for avoiding a contract: *Ross v. Armstrong*, 25 Tex. Supp. 354; 78 Am. Dec. 574; *O'Connell v. Duke*, 29 Tex. 299; 94 Am. Dec. 282.

**THE EVIDENCE TO PROVE MISTAKE** must be clear and satisfactory; a mere preponderance of evidence is not enough: *Parker v. Hull*, 71 Wis. 368; 5 Am. St. Rep. 224; *Milligan v. Pleasants*, 74 Md. 8; *Epstein v. State Insurance Co.*, 21 Or. 179.

**RESCISSION OF CONTRACTS** is the subject of notes to *Hough v. Hunt*, 15 Am. Dec. 572-575; *Miles v. Stevens*, 45 Am. Dec. 631-634; *Johnson v. Evans*, 50 Am. Dec. 672-681; and *Bryant v. Isburgh*, 74 Am. Dec. 657-662.

**COURT OF EQUITY** adapts itself to the peculiar circumstances of each case brought before it: *Higginbottom v. Short*, 25 Miss. 160; 57 Am. Dec. 198. Prayer of complaint does not control in determining what relief shall be given: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436.

**A COURT OF EQUITY WILL REFUSE RELIEF** to a person asking to have a contract rescinded on the ground of mistake, if the complainant has been guilty of a violation of a positive legal duty in not availing himself of the means of knowledge within his reach: See a discussion of this point at page 633 of the note to *Miles v. Stevens*, 45 Am. Dec.

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[IN BANK.]

## FIRST NATIONAL BANK OF SAN DIEGO v. BABCOCK.

[94 CALIFORNIA, 96.]

**GUARANTOR OF NON-NEGOTIABLE NOTE.** — One who writes his name on the back of a non-negotiable note to give it credit thereby becomes a guarantor, and not an indorser, and is *prima facie* liable on the note upon the default of the principal, without previous demand or notice. Mere delay of the payee to proceed against the principal, or to pursue any other remedy, is not available to such guarantor as a defense to his liability on the note.

**PROMISSORY NOTES — STIPULATION FOR ATTORNEY'S FEE.** — A stipulation in a note payable to order, providing for the payment of an attorney's fee if suit is commenced to enforce payment, renders the note non-negotiable.

*Works, Gibson, and Titus*, for the appellant.

*Conklin and Hughes, and Wellborn, Parker, and Stevens*, for the respondent.

**BELCHER, C.** This is an action upon a promissory note made by one Story, payable to the order of plaintiff ninety days after date, and containing the following provision: "Should suit be commenced, or an attorney employed to enforce the payment of this note, I agree to pay an additional sum of five per cent on principal and accrued interest as at-

torney's fees in such suit." The note was executed at the instance and request of the defendant, to take up another note on which he was liable; and before its delivery he indorsed it by writing his name upon the back thereof, and then delivered it to the plaintiff.

The complaint contains no averment that demand for the payment of the note was ever made on the maker, or that notice of its non-payment was given to the defendant before the action was commenced; and the answer denies that defendant, by his indorsement or otherwise, waived protest, or demand, or notice of non-payment, or that he guaranteed the payment of the note; and avers that notice of non-payment was never given him by the plaintiff, or any other person.

After trial, the court found the facts, and, as conclusions of law, "that by the writing of his name upon the back of said note, and the delivery thereof to plaintiff, the defendant, Babcock, became and is a guarantor upon said note; that no demand or notice of protest was required to be given to said defendant; . . . that defendant was not exonerated from the payment of said note as such guarantor by the mere delay on the part of plaintiff in bringing suit, or to prosecute Story"; and that plaintiff was entitled to recover from the defendant the amount due on the note, after deducting certain credits.

Judgment was accordingly so entered, and from it the defendant has appealed on the judgment roll.

The principal question in the case is, What liability did the defendant assume by writing his name on the back of the note? or in other words, did he thereby become a maker, an indorser, or a guarantor of the note? It is contended for appellant that he was an indorser, and that demand and notice of non-payment were necessary to fix his liability. The authorities upon this subject in other states are irreconcilably conflicting, and the question must be solved by reference to the decisions in this state and the provisions of the code.

In *Riggs v. Waldo*, 2 Cal. 485, 56 Am. Dec. 356, Heydenfeldt, J., delivered the opinion of the court, and said: "One who puts his name on the back of a promissory note out of the course of regular negotiability is not an indorser, according to strict commercial meaning. He is termed a guarantor, and this is so, whether his inscription is simply in blank or preceded by the words 'I guarantee,' etc." He then went on to discuss the question; and concluded by saying that the un-

undertaking of such a guarantor "is attended with all the liability and all the rights of an indorser *stricti juris*."

In *Pierce v. Kennedy*, 5 Cal. 139, the note was indorsed by Ford, Lathrop, & Co., out of the course of regular negotiability, and the same learned judge said: "The defendants, Ford, Lathrop, & Co., were guarantors upon the note which is the foundation of this action." He then added that their liability, according to the decision in *Riggs v. Waldo*, 2 Cal. 485, 56 Am. Dec. 356, was strictly that of an indorser.

In *Brady v. Reynolds*, 13 Cal. 32, the defendant and two other persons indorsed a promissory note before its delivery, to assist the maker in obtaining money upon it, and it was held that they were guarantors and jointly liable. The court, by Field, J., said: "Over their names a contract of guaranty could have been written in terms," etc. It is then further said: "The decision of this court in *Riggs v. Waldo*, 2 Cal. 485, 56 Am. Dec. 356, only goes to the extent of holding that a notice of protest is as essential to charge a guarantor as an indorser. It does not change the previous rule in relation to guarantors in any other respect. There are words, it is true, in the opinion which lead to the inference that the distinguished judge who delivered it considered the distinction between the undertaking of an indorser and that of a guarantor more nice and subtle than solid and just. In this we may differ from him, for we are disposed to regard the undertaking of the two as materially different. The contract of both is conditional, but the conditions are unlike. The contract of indorsement is primarily that of transfer; the contract of guaranty is that of security. It is unnecessary, however, to question the language or reasoning of the opinion; the case only decides that notice of protest is equally necessary to fix the liability of a guarantor as to fix that of an indorser."

In *Ford v. Hendricks*, 34 Cal. 673, the note in suit was made by Hendricks, and indorsed by one Reed before delivery, and the court, by Sanderson, J., said: "As to the relation of Reed, — whether it be that of maker, indorser, or guarantor, — there is much conflict of authority; but under the settled rule in this state, he must be regarded a guarantor."

In *Crooks v. Tully*, 50 Cal. 254, the note sued upon was indorsed by one Durkin after it became due, to obtain further time for the maker to pay it; and the court, by Niles, J., said: "The contract of Durkin was that of a guarantor. It has been frequently so held by this court."

It clearly appears from these decisions, that when one, before the enactment of the codes, wrote his name on the back of a promissory note for the purpose of giving it security, and not for the purpose of transfer, his undertaking was that of a guarantor, though he was entitled to the same notice of demand and non-payment as he would have been if an indorser: See also *Jones v. Goodwin*, 39 Cal. 493; 2 Am. Rep. 473.

In this condition of the decisions the codes were enacted, and we must look to them to see in what respects, if any, the rule above stated has been changed. The Civil Code contains the following provisions:—

"Sec. 2787. A guaranty is a promise to answer for the debt, default, or miscarriage of another person."

"Sec. 2807. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice."

"Sec. 2823. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor."

"Sec. 3108. One who writes his name upon a negotiable instrument otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an indorser, and his act is called indorsement."

"Sec. 3117. One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser."

It will be observed that the two sections last quoted relate only to negotiable instruments, and in accordance with the rule declared by them, the case of *Fessenden v. Summers*, 62 Cal. 484, was decided. They do not in any way affect this case, for the reason that the note here sued upon was not a negotiable instrument: *Adams v. Seaman*, 82 Cal. 636. This being so, the defendant must still be treated and held liable as a guarantor.

The question then is, What is now the liability, in this state, of a guarantor? As we have seen, a guaranty is a promise to answer for the debt of another person, and it may be enforced, upon default of the principal, without any previous demand or notice. It is an absolute undertaking to pay the whole debt if the principal does not, and no mere delay of the creditor to proceed against the principal, or to enforce any other remedy, can be availed of as a defense. And such a liability is assumed *prima facie*, when, as in this case, the



guarantor writes his name on the back of a non-negotiable note to give it credit.

Under the circumstances shown here, we think the findings were sufficient, and the court below rightly refused to allow any offset for damages alleged to have been sustained by defendant, because plaintiff, after demand that he should do so, neglected and refused to institute an action against the maker of the note, and thereby secure payment of a portion of the money due thereon.

We advise that the judgment be affirmed.

VANCLIEF, C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed. —

**NON-NEGOTIABLE NOTE, INDORSEMENT OF.** — One who writes his name on the back of a non-negotiable note is liable as guarantor to the holder thereof, and is not entitled to have the notes presented for payment when due, or to be given notice of non-payment: *Cromwell v. Hewitt*, 40 N. Y. 491; 100 Am. Dec. 527, and note; note to *Hall v. Newcomb*, 42 Am. Dec. 87; *Prentiss v. Danielson*, 5 Conn. 175; 13 Am. Dec. 52, and note 55-57.

**NON-NEGOTIABLE NOTE, GUARANTOR OF.** — A guarantor of a non-negotiable note is liable without demand or notice: *Peck v. Frink*, 10 Iowa, 193; 74 Am. Dec. 384; *Wooley v. Sergeant*, 8 N. J. L. 262; 14 Am. Dec. 419.

**NON-NEGOTIABLE NOTE — STIPULATION FOR ATTORNEY'S FEE.** — A stipulation to pay an attorney's fee, if suit is brought thereon, renders a note non-negotiable: *Altman v. Rittershafer*, 68 Mich. 287; 13 Am. St. Rep. 341; note to *Bowie v. Hall*, 9 Am. St. Rep. 436; *First Nat. Bank v. Falkenhan*, 94 Cal. 141. In *Levens v. Briggs*, 21 Or. 333, a stipulation in a note to pay a specified percentage as an attorney's fee in case of suit was held to be void. But in *Montgomery v. Crosthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, it was decided that a stipulation in a note to pay costs of collecting does not destroy its negotiability. And in *Roberts v. Snow*, 27 Neb. 425, the following was held to be a negotiable promissory note payable on demand: "For value received, I hereby promise to pay to Peter Housel, or order, four hundred dollars, with ten per cent interest per annum, payable semi-annually in advance, and on default of prompt payment of interest for thirty days after it is due, then this note, principal and interest, shall be due and collectible without defalcation or discount, together with an attorney fee of ten per cent for collection."

[IN BANK.]

**CALIFORNIA SOUTHERN HOTEL CO. v. CALLENDER.**

[94 CALIFORNIA, 120.]

**CORPORATIONS—STOCK SUBSCRIPTIONS—WAIVER OF DEFENSE BY ACQUIESCENCE.** — If a subscriber for stock in a corporation makes his contract for subscription previous to and in anticipation of the incorporation, he waives the defense that the capital stock of the corporation has not been subscribed as provided for in his contract, by voluntarily acquiescing in the mode of incorporation with a full knowledge of the facts.

**CORPORATIONS—STOCK SUBSCRIPTIONS—WAIVER OF DEFENSE.** — A subscriber to stock in a corporation to be formed may waive any defense he may have to the subscription. Such waiver may be express, or implied from the acts or declarations of the subscriber. A payment of a call with full knowledge of the defense, or any act indicating a clear intent to abide by, accept, or pass over any defense held by the subscriber, will constitute a waiver.

**CORPORATIONS—STOCK SUBSCRIPTIONS—FINDING OF WAIVER OF DEFENSE.** — In an action by a corporation to recover upon a stock subscription, a finding that the subscriber has waived any right to object to the act or method of incorporation implies that he has a knowledge of the right waived, and that the waiver was voluntary. Nor is this conclusion affected by the fact that the court found certain probative facts insufficient in themselves to prove a waiver, and only tending in that direction.

**CORPORATIONS—STOCK—ISSUANCE OF CERTIFICATE.** — It is not necessary to a subscriber's ownership of stock in a corporation that a certificate therefor should have been issued to him, nor is the corporation bound to issue such certificate until the subscription price is fully paid. The corporation may allege the subscriber's ownership of the stock, and recover on the contract of subscription, before issuing a certificate of the stock to him.

**CORPORATIONS—STOCK—LIABILITY FOR CALLS.** — When, by a contract of subscription, a subscriber to stock in a corporation agrees to pay upon the call of the directors, at such time and in such manner as may be determined by them, it is not necessary to a recovery on the contract that such directors should have levied assessments on the stock in the mode prescribed by the statute.

*Venable and Goodchild*, for the appellant.

*J. M. Wilcoxon*, for the respondent.

**VANCLIEF, C.** The plaintiff is a California corporation, to whose capital stock the defendant subscribed five thousand dollars, before its organization, that being fifty shares of the one thousand shares into which the capital stock of one hundred thousand dollars was divided. After having paid two thousand dollars of this subscription, the defendant refused to pay any part of the remainder, and this action was brought to recover from him the remaining three thousand dollars. The cause was tried by the court, and judgment was given in

favor of the plaintiff for the sum demanded. The defendant appeals from the judgment on the judgment roll, without bill of exceptions, and contends that upon the findings of fact the judgment should have been given for the defendant.

The following is a copy of the written agreement to and upon which defendant subscribed for the stock:—

“We, the undersigned, do hereby agree to and with each other, that we will organize and form a corporation, under the laws of the state of California, for the purpose of erecting, building, and owning a hotel building in the city of San Luis Obispo, county of San Luis Obispo, state of California, and for the purpose of purchasing and owning all such real and personal property as may be necessary to be used in connection of said hotel building; and we agree that the capital stock of said corporation shall be one hundred thousand (\$100,000) dollars, divided into one thousand (1,000) shares, of the par value of one hundred dollars each; and we agree to and with each other, that we do respectively subscribe for the number of shares of the stock of said corporation as are set after our respective names, and that we will pay for the same the said par value thereof, at such times and in such manner as may be determined by the board of directors of the said corporation, to be hereafter chosen. And we further agree that whenever seventy thousand (\$70,000) dollars of said capital stock has been subscribed for, a meeting shall be called for the purpose of electing a board of directors, and taking such steps as are required by law to form the said corporation, and that at such meeting the owners of a majority of said subscribed stock shall constitute a quorum, and are authorized to elect said board of directors, and transact any business necessary to fully complete the organization of the said corporation; that the number of directors and the term of said corporation shall be determined at such meeting.”

Here follows the list of subscribers, among whom is the defendant for “fifty shares,—five thousand dollars.” These subscriptions amounted to 772 shares. Among them was one of the Pacific Coast Steamship Company and Pacific Coast Railway Company for one hundred shares, payable in freightage. This subscription purports to have been made through the agency of Goodall, Perkins, & Co. Another of the subscriptions is by Edwin Goodall for 125 shares, partly payable in a block of land, if accepted by the company, estimated at \$7,500, and the balance of \$5,000 in cash.

The court finds that Goodall, Perkins, & Co. were not authorized to subscribe for the steamship and railway companies, but that the subscription of these companies, and also that of Edwin Goodall, entered into the computation, and constituted a part of the 772 shares subscribed before the organization of the corporation. The court further found that the corporation was organized on August 17, 1887, and that the articles of incorporation included as subscribers the name of the Pacific Coast Steamship Company for 100 shares, amounting to \$10,000, and that of Edwin Goodall for 125 shares, amounting to \$12,500, without conditions; and further found "that at the preliminary meeting of stockholders, held for the purpose of considering whether or not the incorporation aforesaid should be organized and formed, defendant was not present, and did not vote for the shares subscribed for by him as aforesaid, and did not acquiesce in or agree that the incorporation should be formed on the subscription aforesaid; . . . that Edwin Goodall, for himself and for the Pacific Coast Steamship Company, united in the call for the meeting of the stockholders last aforesaid, and each were represented at said meeting to the full amount of the stock subscribed for by them as aforesaid by Edwin Goodall, and he voted and acted at said meeting for the full amount of the stock subscribed for by them, viz., 225 shares, of the value of \$22,500, and each has ever since the incorporation of the plaintiff been, and now is, a stockholder in said corporation for the full value and amount of the stock aforesaid subscribed by him"; and further found that the subscriptions of the steamship company and Goodall were accepted and acted upon by plaintiff, and have been fully paid to the company; and further found that "defendant has at all times recognized the validity of the corporation aforesaid, by paying two thousand dollars of said original subscription of five thousand dollars, and not otherwise, and has never dissented from or protested against any of its acts; that defendant has, since said corporation was formed, acquiesced in the building of the hotel mentioned in said agreement, and furnishing the same, and the incurring of debts and expenditures of money therefor, by paying said two thousand dollars of said subscription to said corporation, and not otherwise; . . . that a large indebtedness has been incurred by plaintiff, and large sums of money expended, relying upon the subscriptions aforesaid"; and further found (under the head of "conclusions of law") that the defendant

"has waived any defense he might otherwise have had to said subscription by reason of the manner of plaintiff's incorporation."

The findings show that calls were made upon the subscribers, including the defendant, as follows: November 16, 1887, twenty per cent, payable November 25th; March 17, 1888, twenty per cent, payable March 25th; May 23, 1888, twenty per cent payable June 1st, twenty per cent payable June 15th, and twenty per cent payable July 1st.

1. The first and principal point made by appellant is, that the corporation was organized before there was a valid subscription of seventy thousand dollars of the capital stock, contrary to the agreement subscribed by defendant, inasmuch as Goodall, Perkins, & Co. subscribed for the steamship company and railway company without authority, and in part conditionally.

It appears, however, that these subscriptions were changed before the corporation was organized, the railway company being dropped, and the subscription of the steamship company being substituted for that of both of these companies, and for the full amount thereof, and the subscription of the steamship company and that of Goodall being made unconditional, and so entered in the articles of incorporation. It is also found by the court that Goodall, for himself and for the steamship company, united in the call for the meeting of the subscribers for the purpose of considering the propriety of organizing the corporation; that Goodall represented all their stock at that meeting; that he signed and acknowledged the articles of incorporation; and that the steamship company and Goodall paid all the calls upon all the stock subscribed by them. It is not expressly found, nor, it seems to me, by necessary implication, that Goodall was not authorized by the steamship company to join in the call for the meeting to make the change in the subscription, and to represent the steamship company in the organization of the corporation; but only that the original subscription by Goodall, Perkins, & Co. for the two companies was without authority. If Goodall was authorized by the steamship company to represent it in all these matters, the corporation was properly organized according to the subscription agreement, and the defendant has no ground of complaint. As, however, the findings are not quite clear upon this point, and as I think the judgment should be affirmed on another ground, which does not involve any doubtful

question of construction of the findings, the decision of the case need not rest upon this point.

2. The court found that the defendant had "waived any defense he might otherwise have had to said subscription by reason of the manner of plaintiff's incorporation."

Says Mr. Cook in his book on stocks and stockholders, section 181: "A subscriber may waive the defense that the full capital stock of the corporation has not been subscribed. This waiver may be either express, or implied from the acts or declarations of the subscriber."

Again, at section 186, the same author says: "Where the subscriber made his contract of subscription previous to and in anticipation of the incorporation, and does not, by his subsequent acts, acquiesce in the mode of incorporation, he may set up that the corporation has not been incorporated, and that he is not liable."

At section 198 he says: "A subscriber to stock in a corporation may waive any defense he may have to the subscription. The waiver may be express, or it may be by implication from the acts and declarations of the subscriber. Thus a payment of a call with full knowledge of the defense is held to be a waiver, and any act indicating a clear intent to abide by or accept or pass over an objection which the subscriber might make will be held to be a waiver": See authorities cited in notes to above quotation; Thompson on Liability of Stockholders, sec. 120; Taylor on Private Corporations, sec. 519; *New Hampshire etc. R. R. Co. v. Johnson*, 80 N. H. 390; 64 Am. Dec. 800.

In *Fishback v. Van Dusen*, 83 Minn. 111, Mr. Justice Mitchell, speaking for the court, said: "Whether there has been a waiver is a question of fact. It may be proved by various species of evidence, — by declarations, by acts, or by forbearance to act." Other authorities say it is a mixed question of law and fact, but that each case must depend upon its own peculiar circumstances and surroundings. "It is a question of intention, and a fact to be determined by the triers of fact": *Okey v. State Ins. Co.*, 29 Mo. App. 111; *Ehrlich v. Aetna Life Ins. Co.*, 88 Mo. 249; *Drake v. Farmers' Union Ins. Co.*, 3 Grant Cas. 325; *Witherell v. Maine Ins. Co.*, 49 Me. 200; "and though the waiver must be intentional and clearly proven, the sufficiency of the evidence relating thereto is for the jury": *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

The only question of law that can be involved in the ques-

tion of waiver must relate to the legal definition of the word; for example, a jury might be properly instructed, as matter of law, that a waiver must be voluntary, and that it implies a knowledge of the right, claim, or thing waived; yet, whether it was voluntary, and whether the party had knowledge of the right or thing waived, are still questions of fact to be submitted to the jury.

In this case, the court found the ultimate fact that defendant had waived any right he may have had to object to the organization of the corporation. This finding implies the defendant's knowledge of the right waived, and that his waiver was voluntary, since these attributes are included in the legal definition of a waiver. Nor is this conclusion affected by the fact that the court also found certain probative facts, the only tendency of which was to prove the waiver. That defendant recognized the validity of the corporation, and acquiesced in the building of the hotel, etc., "not otherwise" than by paying the first two calls on his subscription, and never dissenting or protesting against any of the acts of the corporation, are in no degree inconsistent with the waiver found, as they do not tend to prove that the waiver was involuntary, or without defendant's knowledge of his alleged right. Conceding, therefore, that the probative facts (unnecessarily) found are insufficient to prove a waiver, yet, as the record contains no part of the evidence, it must be presumed that there was sufficient evidence to justify the finding of a waiver.

3. It is contended that this action cannot be maintained "on the theory that defendant is a stockholder, and as such liable to the corporation for assessments," for the alleged reason that it does not appear "that the corporation ever awarded any stock to defendant, or entered his name on its stock-book, or anything to show that defendant was a stockholder."

It is alleged in the complaint, and expressly found by the court, that defendant was the owner of fifty shares of stock at all the times when the calls were made. It was not necessary to defendant's ownership of the stock that a certificate for the stock should have been issued to him: *Mitchell v. Beckman*, 64 Cal. 121, and authorities there cited; nor was the corporation bound to issue such certificate until the subscription price was fully paid; nor was it necessary to a recovery on the contract of subscription that the directors of the corporation should have levied assessments upon the stock in the mode prescribed by the Civil Code. By the contract of subscription, the de-

pendant agreed to pay upon the call of the board of directors, viz., "at such time and in such manner as may be determined by the board of directors of the said corporation, to be hereafter chosen"; and the action was properly brought upon this contract: *West v. Crawford*, 80 Cal. 27; *Lankershim Ranch etc. Co. v. Herberger*, 82 Cal. 600; Angell and Ames on Corporations, sec. 549.

I think the judgment should be affirmed.

FITZGERALD, C., and BELCHER, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

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THE LIABILITIES ARISING FROM A SUBSCRIPTION TO THE STOCK of a projected corporation are discussed in a note to *Parker v. Thomas*, 81 Am. Dec. 392-402. One who subscribes to stock, in view of and for the purpose of the subsequent organization of a corporation, and pays in full for one share, and transfers other shares, after the organization is effected, affirms thereby his contract of subscription, and cannot be heard to disaffirm it: *Bell's Appeal*, 115 Pa. St. 88; 2 Am. St. Rep. 532, and note. No one can be made a stockholder without his consent, express or implied: *Glenn v. Garth*, 133 N. Y. 18. Act of voting stock does not make absolute stockholders, and they are still entitled to show that they held such stock as collateral security: *Union etc. Ass'n v. Seligman*, 92 Mo. 635; 1 Am. St. Rep. 776, and note.

AS TO THE EFFECT OF SUBSCRIPTIONS PRIOR TO ORGANIZATION, see *Minneapolis etc. Co. v. Davis*, 40 Minn. 110; 12 Am. St. Rep. 701. In *Taggart v. Western Maryland R. R. Co.*, 24 Md. 563, 89 Am. Dec. 760, it was held, after an exhaustive review of the cases, that neither the rights of the corporation nor the liabilities of the subscriber in regard to such subscriptions could be fixed without an exact compliance with the act of incorporation, and that there was, in this respect, a well-recognized distinction between subscriptions before and after organization.

ISSUANCE OF STOCK CERTIFICATE IS NOT NECESSARY to make one a shareholder in a corporation: *Cartwright v. Dickinson*, 88 Tenn. 476; 17 Am. St. Rep. 910; *Butler's University v. Schoonover*, 114 Ind. 381; 5 Am. St. Rep. 627; and a corporation may maintain an action to recover assessments legally made on shares without a tender of the certificate: *Astoria etc. R. R. Co. v. Bui*, 20 Or. 177.



[IN BANK.]

## WHITNEY v. KELLEY.

[34 CALIFORNIA, 146.]

**JUDGMENT—RELIEF IN FAVOR OF GRANTEE OF PARTY.**—When a judgment has established that a certain person is not the owner of land in dispute, his subsequent grantee thereof, who is out of possession and was not a party to the suit in which such judgment was rendered, cannot maintain a suit at law or in equity to set aside the judgment on the ground of fraud in its procurement.

*Sprigg and Barber*, for the appellant.

*Works, Gibson, and Titus, Parrish, Moosholder, and Lewis, and Luce and McDonald*, for the respondents.

GAROUTTE, J. This is an appeal from a judgment dismissing an action, a demurrer to the complaint having been sustained, and the plaintiff declining to amend. In September, 1886, some of the defendants, and the grantors of others, claiming title to the land involved in this suit, brought an action against the grantors of plaintiff to establish by judicial decree the true boundary line between the lands of the respective parties to that suit. The judgment therein rendered determined the boundary line, and adjudged the plaintiffs to be the owners of the tract of land involved in the present action. Plaintiff, as grantee of the defendants in that action, now files his complaint to set aside that judgment, upon the ground that it was procured through certain frauds practiced upon the defendants therein, the plaintiff's grantors. The complaint further alleges that "said lot was duly conveyed to plaintiff for value before the commencement of this action, and that he is now the owner and entitled to the possession thereof," and further adding that the defendants herein have no title thereto other than that obtained by said judgment.

This is an action to set aside a judgment upon the ground of fraud, brought by a plaintiff who was not a party to the suit in which the judgment was rendered, but is a grantee of the defendants in said action. It is insisted that, as such, he has no standing before a court of equity, and if that be true, the judgment must be affirmed. The question here presented is one of importance, and as far as we are advised, one not directly adjudicated upon in this state. Owing to the fact that there is not an entire uniformity in the decisions upon the question, it is enveloped in some doubt, but we believe the better rule and the weight of authority support the principle

of law as adduced in Freeman on Judgments, sec. 512, where it is said: "No person will be permitted to proceed in equity against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights. If the parties to an adjudication are satisfied with it, no outside persons will be permitted to intermeddle with it at law or equity." Judge Story, in his work on equity jurisprudence, sec. 1040 g, speaking upon this subject, says: "So an assignment of a bare right to file a bill in equity for a fraud committed upon the assignor will be held void, as contrary to public policy, and as savoring of the character of maintenance. . . . Indeed, it has been laid down as a general rule that where an equitable interest is assigned in order to give the assignee a *locus standi in judicio* in a court of equity, the party assigning such right must have some substantial possession and some capability of personal judgment, and not a mere naked right to upset a legal instrument or to maintain a suit." The principle here announced is supported in *Cross v. Sacramento Sav. Bank*, 66 Cal. 462; *Sanborn v. Doe*, 92 Cal. 152; *French v. Shotwell*, 5 Johns. Ch. 565; *Marshall v. Means*, 12 Ga. 61; 56 Am. Dec. 444; *Prosser v. Edmonds*, 1 Younge & C. 496; *Graham v. Railroad Co.*, 102 U. S. 154; *Crocker v. Bel-langee*, 6 Wis. 667; 70 Am. Dec. 489.

The case of *Prosser v. Edmonds*, 1 Younge & C. 496, is the leading case, and the principle there involved is practically the same as is involved here. In that case the lord chief baron said: "But in a case where a party assigns his whole estate, and afterwards makes an assignment generally of the same estate to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor himself making no complaint of fraud whatever, it appears to me that the right of the second assignee to make such claim would be a question deserving of great consideration. . . . In such a case a second assignment is merely that of a right to file a bill in equity for a fraud. . . . In the present case it is impossible that the assignee can obtain any benefit from his security except through the medium of the court. He purchases nothing but a hostile right to bring parties into a court of equity, as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. . . . Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a

right can be the subject of assignment, whether at law or equity." In *Graham v. Railroad Co.*, 102 U. S. 154, a case where subsequent creditors attempted to set aside a conveyance secured by fraud practiced against the debtor, Justice Bradley, in the opinion of the court, said: "It seems clear that subsequent creditors have no better right than subsequent purchasers to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in, and which he has manifested no desire to disturb. Yet in such a case, subsequent purchasers have no such right"; also quoting from *French v. Shotwell*, 5 Johns. Ch. 565, wherein Chancellor Kent said: "If the party himself, who is the victim of fraud or usury, chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent, by collusion between the parties to it on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only as between the parties, it is for the injured party alone to apply the remedy." In this case of *Graham v. Railroad Co.*, 102 U. S. 154, the learned justice entered into an exhaustive review of the authorities upon the question, and approved the case of *Crocker v. Bellangee*, 6 Wis. 667, 70 Am. Dec. 489, wherein it is expressly held that a subsequent purchaser cannot attack a conveyance made by his grantor upon the ground of fraud practiced upon such grantor. *Prosser v. Edmonds*, 1 Younge & C. 496, is also approved; and after reviewing the case of *Dickinson v. Burrell*, L. R. 1 Eq. 337, the opinion continues: "Surely there is here no overruling of *Prosser v. Edmonds*, 1 Younge & C. 496, even if such overruling could avail against the Wisconsin decisions." The cases of *Dickinson v. Burrell*, L. R. 1 Eq. 337, and *McMahon v. Allen*, 35 N. Y. 403, upon a careful examination, seem to some extent to be opposed to the principle announced in the text-books and authorities cited; but the true doctrine based upon reason and authority appears to be, that the right to complain of fraud should not be recognized by a court of equity as a marketable commodity. Indeed, the leading case of *Dickinson v. Burrell*, L. R. 1 Eq. 337, and the decisions following in its wake, recognize that principle as correct; but Lord Romilly, in the *Dickinson* case, attempts this distinction; he says: "If James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without con-

veying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A B, to maintain this bill; but if A B had bought the whole of the interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." It is difficult to appreciate the distinction thus attempted to be drawn in the two cases. The one is an assignment of a right to acquire property by setting aside a fraudulent conveyance of it, and the other a conveyance of the property with an incidental right of setting aside the prior fraudulent conveyance. But the conveyance of the property in its then *status* is neither more nor less than an assignment of a right of action for the fraud. For at that time the grantor had no other interest in or pertaining to the property.

Applying these principles to the facts of the case at bar, what will be the result? It may be conceded that the right to set aside this judgment by the plaintiff, upon the ground of fraud, rests upon the same plane as if it were a conveyance rather than a judgment. In the former case the judgment decreed the defendants herein to be the owners of the land. In the absence of any showing to the contrary, it must be assumed that the pleadings justified such a decree, and in addition thereto, we have the allegation here that plaintiff is entitled to the possession of the land, and that it was conveyed to him for value. We then have this plaintiff, as the grantee of parties against whom a judgment existed, declaring them to have no title in a tract of land, not being in possession, bringing this action years after the rendition of such judgment, to set it aside, upon the ground of fraud practiced against his grantors in the securing of it. In *Prosser v. Edmonds*, 1 Younge & C. 496, Lord Abinger said: "Where an equitable interest is assigned, it appears to me . . . the party assigning that right must have some substantial possession,—some capability of personal enjoyment." And again he says: "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill." As we have already seen, this principle was indorsed by Judge Story; and in the present case it can well be said that plaintiff's grantors, when they conveyed, were in possession of nothing but a mere naked right, and could obtain nothing without filing a bill. If plaintiff's grantors had nothing but a mere naked right to file a bill to set aside this judgment, then this plaintiff, their grantee, can have no title. It is essential that a party complaining in equity

should have some present substantial interest in the subject-matter of the suit. He must have a direct interest in the result of the litigation, and his complaint must clearly indicate that fact. The plaintiff here has no interest in this land, for his grantors had no interest when they transferred to him. If the court should set aside the judgment, plaintiff would get no title thereby, and consequently he stands here upon a bare naked right to bring an action to set aside a judgment upon the ground of fraud practiced upon his grantors, and no case in the books can be found to sustain such position. This judgment is not void, but only voidable, at the desire and motion of the parties defrauded, and can only be avoided by a decree of a competent court. The conveyance to the plaintiff did not avoid the effect of the judgment. The title, and all the title, still remained in the judgment plaintiffs, and a *bona fide* purchaser from them would have obtained a perfect and complete estate. As the grantors had no interest to convey, the grantee received nothing by the conveyance. The grantors had the right, by appealing to the proper court, to secure a decree whereby the title would return to them, but by neglect or desire they could lose or waive such right. There is nothing in this complaint to indicate but that these grantors, prior to the conveyance, expressly waived their right to bring an action to set aside the judgment upon the ground of fraud. If they chose to waive that right, it is neither justice nor sound policy that a subsequent purchaser with notice of the judgment should be allowed to investigate the merits of the original transaction. The one fact that they conveyed to the plaintiff is no sufficient negative of the existence of such waiver. Such conveyance might not even indicate hostility to the judgment. It certainly had no weakening effect upon the title created and declared by the judgment. Plaintiff's grantors had no power by conveyance, or otherwise, to nullify the effect of this judgment, except by a direct assault upon it in a court of equity. They had the right to make the assault, and that is all the right they possessed. They had neither the title, the possession, nor the right of possession; and under such circumstances, their conveyance to plaintiff carried nothing but a mere naked right to bring an action to set aside a judgment for a fraud practiced upon them. A plaintiff with such a right has no equity, and is not entitled to recognition in a court of equity.

Let the judgment be affirmed.

HARRISON, J., concurred in the judgment, without expressing any opinion on the question discussed by Mr. Justice Garoutte in the principal opinion. Mr. Justice Harrison expressed the opinion that a party could not maintain an action to set aside a judgment for fraud, unless the defendant in that action had the right, and that the party attacking the judgment must set forth his cause of action as fully as such defendant would be compelled to do if he were seeking relief. Such party must show by his complaint, the facts constituting the fraud which give him a right to relief, that he has a meritorious defense to the original action, and that he is able to present to the court the evidence constituting that defense. He must not only allege these matters as ultimate facts, or allege them in the form of an affidavit of merits, but he must incorporate the facts themselves in his complaint, that the court may determine therefrom, in case the allegations are admitted by the adverse party, whether or not the complaining party would have been entitled to a judgment in his favor in the original action. The following quotations are made in support of the above rule: "A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached"; 2 Daniell's Chancery Practice, \*1585; Story's Eq. Pl., sec. 428. 'The bill should state particularly the facts to be proved, the names of the witnesses, and show the bearing and relevancy of the proposed proofs. It should also show when and how the facts discovered came to the knowledge of the plaintiffs, and why no motion for a new trial was made in the court trying the case'; *Mulford v. Cohn*, 18 Cal. 46. If the plaintiff seeks to maintain the action upon the ground of newly discovered evidence, he 'must describe the new evidence very distinctly and specifically, and state when it was discovered, and its bearing on the decree. It is not sufficient that he expects to prove certain facts; he must state the exact evidence to establish them'; 1 Daniell's Chancery Practice, \*1578, note 1; *Dexter v. Arnold*, 5 Mason, 312; *Livingstone v. Noe*, 1 Lea, 55; *Butler v. Vassault*, 40 Cal. 78. 'An action of this nature must be brought within the time prescribed for an appeal from the original judgment'; *Allen v. Currey*, 41 Cal. 318; *Evans v. Bacon*, 99 Mass. 213; 'and all who were parties to the original judgment must be made parties to the action to set it aside'; *Harwood v. Railroad Co.*, 17 Wall. 78." The complaint in this action is deficient in all these requisites. It does not allege, either generally or specifically, the former judgment and the proceedings which led to it. It contains but a single allegation as to the effect of such judgment, and its form is not averred at all. It fails to show whether or not the court had jurisdiction of the defendants, and the averment therein contained, that one of them received no summons, does not show clearly that the court had no jurisdiction over him. It alleges fraud only in the averments that the complaint in the former action was drawn "with the intent" that the defendant therein should not suspect the real object of the action, and that the plaintiffs therein "represented to Lilian Cullen and other defendants" that they were made parties as matter of form only, and that they need not appear nor answer. This allegation is defective in not setting out in full the original complaint, to enable the court to determine whether or not the "intent" with which it was drawn was as is alleged; and it is also defective in not showing the manner in which the "representations" charged were made. "The entire averment is made upon information and belief, without setting forth the sources of the information, or the grounds for the belief. Other averments essential to his cause of action are made upon information and belief." It is not a sufficient answer to the rule above given, that the facts

constituting the defense must be averred with strict definiteness and certainty, "that the code permits a complaint to be made upon information and belief. The provision of the code that causes in equity, as well as those at law, are to be presented under the same form of pleading, has not changed the principles under which equitable relief shall be granted. When a plaintiff's right to such relief depends upon facts which are *quasi* jurisdictional in their nature, — such as his personal *status*, his freedom from negligence or laches, the fraudulent or inequitable conduct of the party against whom that relief is sought, or matters in respect to which the court may exercise its discretion, or which it must determine have an existence before it can entertain his complaint, — it is as essential under the present system as under any other that those matters should be presented by such positive and verified allegations that the court may determine their sufficiency. The plaintiff cannot substitute his own judgment for that of the court, and a complaint in which these jurisdictional facts are alleged upon the information and belief of the plaintiff does not state facts sufficient to show that he has a right of action. The plaintiff does not show that he has sought this relief with sufficient promptness. He does not allege when he acquired any interest in the land, or from whom he acquired it, — his averment being, that it was duly conveyed to him for value 'before the commencement of this action.' Such an allegation is consistent with a conveyance before the former action, or from persons other than the defendants in that action. Neither does the plaintiff allege when he received the information which is the basis of this action, or indeed that he knows or can produce any evidence which will vary the former judgment, — his only averment being, that in September, 1889, it was 'intimated' to him that the land could be identified by one Wheeler, and that if the judgment is set aside, he can produce his evidence; but he does not show, except by recital, the nature or effect of the evidence that he expects to produce." Under the foregoing principles, and for the reasons given, the complaint failed to state a cause of action, and the demurrer thereto was properly sustained.

ASSIGNMENT OF MERE RIGHT TO FILE BILL IN EQUITY, when void, as against public policy: See *Marshall v. Means*, 12 Ga. 61; 56 Am. Dec. 444, and note 449-451; *Milwaukee etc. R. R. Co. v. Milwaukee etc. R. R. Co.*, 20 Wis. 174; 88 Am. Dec. 740.

NECESSITY OF AVERRING FACTS CONSTITUTING FRAUD. — The rule laid down by Mr. Justice Harrison in his concurring opinion is abundantly supported by authority: See *Peeney v. Howard*, 79 Cal. 529; 12 Am. St. Rep. 162; *Albertoli v. Branham*, 80 Cal. 631; 13 Am. St. Rep. 200; *People v. Healy*, 128 Ill. 9; 15 Am. St. Rep. 90. On the other hand, a complaint alleging facts which, if proved, would establish fraud as a conclusion of law, sufficiently alleges fraud, without a specific declaration that such facts are fraudulent: *Andrews v. King Co.*, 1 Wash. 46; 22 Am. St. Rep. 128.

[IN BANK.]

## PEOPLE v. MURRAY.

[94 CALIFORNIA, 212.]

**NEW TRIAL — EVIDENCE ON MOTION FOR.** — When, on the hearing of a motion for a new trial in a criminal case, evidence is introduced showing that the jury had read newspaper articles during the trial, claimed to have a tendency to influence their verdict, the rebutting evidence of the jurors themselves, that the reading of such articles did not influence, nor tend to influence, them in any way prejudicial to the accused in rendering their verdict, is admissible.

*Hunsaker, Britt, and Goodrich*, for the appellant.

*W. H. H. Hart*, attorney-general, and *W. H. Layson*, deputy attorney-general, for the respondent.

**FOOTE, C.** The defendant was tried and convicted of the crime of murder. He appealed to this court from the judgment rendered in the premises, and from an order refusing a new trial. The judgment was affirmed, but the order denying a new trial was reversed. The case is reported in 85 Cal. 350-361, where it was said, among other things: "The order denying the defendant a new trial is reversed, with instructions to the court below to vacate the same and rehear the motion, allowing the defendant to introduce the evidence excluded on the former hearing, and the people to rebut the same by other evidence, if it is desired."

Accordingly, the motion for a new trial was again heard, and the evidence, which showed that the jury had read newspaper articles during the trial, which it is claimed had a tendency to influence their verdict, was allowed to be introduced in the defendant's behalf.

The people then showed, over the objections of the defendant, by the jurors themselves, that the reading of those articles had not tended to or had influenced them in any way prejudicial to the defendant in rendering their verdict.

The admission of this rebutting evidence is urged by the defendant as prejudicial error. And upon the determination of that question the whole matter turns.

In the former decision this court said: "An attempt on the part of any person, whether through the medium of a newspaper or otherwise, to influence a jury by any improper means to bring in a verdict against a defendant is a palpable violation of his right to a fair and impartial trial, and if it appears to the court to have had such an effect, a new trial should be



granted. There can be no doubt as to the intention or palpable effect of the articles above set out. It was the clear intention of the publishers of this paper to intimidate the jury, and by abusing other jurors who had returned verdicts of acquittal, to induce them to find the defendant guilty, and impose upon him the extreme penalty of the law. Whether they had that effect upon the jury or not was a question that the defendant had a right to have determined by the court on his motion for a new trial. The defendant should have been allowed to make the proof, with leave to the people to show, if possible, that these particular articles were not read by the jury, or if they were, that they were not in any way influenced by them: *People v. Goldenson*, 76 Cal. 328, 353."

The evidence of the jurors was in support of their verdict, and it is plainly evident the appellate court intended that the trial court should permit the defendant to introduce the evidence he did on the hearing of the motion, and that the people might show, if they could, either that the prejudicial articles in the newspaper were not read by the jury, or that, if they had read them, that "they were not in any way influenced by them."

In obedience to this command of the superior tribunal, the court below allowed the people to rebut what might be a presumption that the jury were influenced by the articles which they had read, and to show by their evidence, if it could be done, that the jury had not been thus influenced, and thus sustain their verdict.

This view of the matter is in accordance with the case of *People v. Goldenson*, 76 Cal. 352, and cases cited, where it is said: "One of the grounds upon which defendant asked for a new trial was, that the jury had been guilty of misconduct, by which a fair consideration of the case had been prevented. The substance of the misconduct charged consisted in the jurors having disobeyed the admonition of the court about reading newspaper articles during the trial, which reflected on the defendant. All of the jurors filed affidavits denying fully the charges of misconduct preferred, and insisting that no admonition of the court had been disobeyed, and that no newspaper articles or anything else, save the evidence and the charge, influenced them in finding their verdict. These affidavits were allowable, and are conclusive upon the point made: *People v. Hunt*, 59 Cal. 430; *People v. Dye*, 62 Cal. 523."

In thus following the views of the appellate court, we per-

ceive no prejudicial error on the part of the court below, and advise that the order denying a new trial be affirmed.

BELCHER, C., and VANCLIEF, C., concurred.

The COURT. The order denying a new trial is affirmed.

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**NEW TRIAL — AFFIDAVITS OF JURORS.** — Affidavits of jurors are admissible to support their verdict: *Tenny v. Evans*, 13 N. H. 462; 40 Am. Dec. 166, and note; *McDade v. State*, 27 Tex. App. 641; 11 Am. St. Rep. 216; *Grotthus v. State*, 70 Wis. 470. Affidavits of jurors are admissible to deny alleged misconduct on their part, when urged as a ground for new trial, and are conclusive as to whether newspaper articles were read by them which influenced their verdict: *People v. Goldensohn*, 76 Cal. 323.

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[IN BANK.]

## SOUTHERN CALIFORNIA LUMBER COMPANY v. OCEAN BEACH HOTEL COMPANY.

[94 CALIFORNIA, 217.]

### JUDICIAL SALES — FORECLOSURE OF LIEN — SALE AFTER RETURN DAY. —

The only process provided in California for the enforcement of a judgment foreclosing a lien upon specific property is that prescribed by section 684 of the Code of Civil Procedure, requiring that such judgment be enforced by a "writ" reciting the judgment and directing a sale of the property. Such "writ" is not an "execution" so as to make it returnable within a certain time, as in the case of executions, and a sale under such "writ" may be made after the return day thereof.

**JUDICIAL SALES AFTER RETURN DAY.** — Where a judgment is not a lien upon property, but a levy under execution is made prior to or upon the return day of the writ, a sale of the property levied upon may lawfully be made after the return day. If a judgment is a lien upon property, or designates the property to be sold, no levy is necessary to a sale, and the property may be lawfully sold after the return day of the writ.

### JUDICIAL SALES — SETTING ASIDE SALE MADE AFTER RETURN DAY. —

Where a judgment is a lien upon property, the time within which it may be sold is directory and within the control of the court; and in the absence of proof that injury has resulted from delay in making the sale, it should not be set aside merely because it was not made before the return day named in the order of sale.

*Wellborn, Stevens, and Wellborn, and F. W. Ewing*, for the appellant.

*Works, Gibson, and Titus*, for the respondent.

**HARRISON, J.** On December 1, 1888, the plaintiff obtained a judgment against the defendant, foreclosing a material-man's lien upon a block of land in the city of San Diego, and direct-

ing a sale of the property, and the application of the proceeds to the payment of the amounts adjudged to be due.

On October 8, 1889, a writ for the enforcement of this judgment was issued and placed in the hands of the sheriff of the county. By the writ the sheriff was commanded to proceed to advertise for sale and sell the property, and to make and file his report of the sale with the clerk of the court within sixty days after his receipt thereof. In obedience to this command, the sheriff published and posted notice that he would sell the property on a day named, and within the time limited for the return of the writ, but no sale was ever made pursuant to that notice, "action thereon having been indefinitely postponed pursuant to an agreement by the parties plaintiff and defendant that there should be no sale prior to February 24, 1890." The sheriff retained the writ, and subsequently again published and posted notice that he would sell the property thereunder on February 24, 1890; and on that day he sold the whole block to the plaintiff for the sum of \$451.40.

The block sold consisted of fifty-four lots, as shown by an official plat on file in the office of the county recorder, and at the time of the sale was of the value of five thousand dollars.

On February 21, 1891, the defendant moved the court to vacate and set aside the sale made by the sheriff as aforesaid, upon two grounds: 1. Because the property consisted of fifty-four lots, and was sold as a whole; 2. Because the property was advertised for sale and sold after the return day of the writ.

The court overruled the motion on the first ground, and sustained it on the second ground, and thereupon made and entered its order vacating the sale. From this order the plaintiff appeals.

The Code of Civil Procedure, the chapter headed "The Execution," provides:—

"Sec. 681. The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

"Sec. 682. The writ of execution must be issued in the name of the people," etc.

"Sec. 683. The execution may be made returnable at any time not less than ten nor more than sixty days after its receipt by the sheriff," etc.

"Sec. 684. . . . When the judgment requires the sale of property, the same may be enforced by a writ reciting such

judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith."

The only process provided in this state for the enforcement of a judgment foreclosing a lien upon specific property is that prescribed by the section of the code last quoted. The writ here in question was issued in the name of the people, and pursuant to the provisions of that section. It is, however, claimed by appellant that a "writ" so issued is not an "execution," within the meaning of section 683, and hence that there is no limitation of time within which it must be made returnable.

A writ of execution is defined to be "process authorizing the seizure and appropriation of the property of a defendant for the satisfaction of the judgment against him": Anderson's Law Dict. When issued upon a judgment running generally against the property of the defendant, it is an authority to the sheriff to seize of the property of the defendant a sufficient amount to satisfy the judgment. As the judgment itself does not specify the property which is to be taken, none of the property of the defendant is affected thereby, or charged with the lien of the judgment, until it is taken by the sheriff under the writ. "Until a levy, property is not affected by the execution": Code Civ. Proc., sec. 688. As the sheriff can justify an interference with the possession by the defendant of any of his property, only upon the production of a writ therefor, it is incumbent upon him to show that a seizure of the particular property is within the scope of his writ; and if, by the terms of the writ, such seizure is authorized only within a limited period of time, a seizure after that time has expired is unauthorized, and the sheriff is liable for a trespass. If, however, the sheriff has taken the property within the lifetime of the writ, it has then become lawfully subject to be applied in satisfaction of the judgment, and a sale thereof may be made at any time thereafter: Rorer on Judicial Sales, sec. 872.

"Wherever some statute does not provide otherwise, an officer who has entered upon the execution of the writ before the return day thereof, by a seizure of or levy upon property, may, after the return day, and after the actual return, continue to hold the property, and may prosecute such further proceedings as may be necessary to convert such property, whether it be real or personal, into money for the purpose of satisfying the judgment": Freeman on Executions, sec. 106. The levy may be made at any time during the last day of the writ, and the

property will be thereafter legally held by the sheriff against any claim or complaint of the judgment debtor. A writ of *venditioni exponas* is sometimes issued, but its issuance is not necessary to justify a sale, as the writ itself is only a direction to perform a duty which already exists, and the sheriff acquires no additional authority from its issuance. "By the levy, a lien is created whose duration is not limited to the return day of the writ, and from this it must necessarily follow that the officer has authority, notwithstanding the passing of such return day, to make his levy productive by a sale of the realty levied upon, and this authority is not dependent on the issuing of a *venditioni exponas*, for this writ does nothing more than to compel performance of a pre-existing duty": Freeman on Executions, 2d ed., sec. 58. This rests upon the principle that the levy is the essential act by which the property is set apart for the satisfaction of the judgment and taken into the custody of the law, and that after it has been taken from the defendant, his interest is limited to its application to the judgment, irrespective of the time when it may be sold.

A decree or a decretal order for the sale of certain specific property, made by a court of equity, differs materially from a common-law judgment. Instead of running against the entire property of the judgment debtor, it specifies the property which the court directs to be sold for the purpose of carrying its judgment into effect, and the officer, in executing this order, acts under the direct mandate of the court, without the power or necessity of taking any property from the possession of the defendant. Such a judgment under the chancery system was not carried into effect by a writ of execution, but a certified copy thereof was furnished to the master as his authority for making the sale, and the master was at liberty to exercise his discretion in regard to the time and place at which the sale should be made: Wiltse on Mortgage Foreclosures, sec. 517; *Blossom v. Railroad Co.*, 3 Wall. 208. This practice prevailed in many parts of this state until the amendment in 1874 to section 684 of the Code of Civil Procedure: *Heyman v. Babcock*, 30 Cal. 367.

In 1874, by an amendment to section 684 of the Code of Civil Procedure, authority was for the first time given for the issuance of anything in the nature of process for the purpose of enforcing a judgment directing a sale of real property. In the amendment thus made, there is preserved the distinction between the mode of executing a common-law judgment and

a decree in equity. The process by which the decree is to be enforced is not termed a "writ of execution," as is that which is to enforce the ordinary money judgment, but the section provides: "When the judgment requires the sale of property, the same may be enforced by a 'writ' reciting such judgment, or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith." This "writ" is neither styled an execution, nor is it such in its nature, and the provision of section 683 of the Code of Civil Procedure, requiring the "execution" to be made returnable within sixty days, is inapplicable. Even though the process thus authorized should, under the provisions of section 681 of the Code of Civil Procedure, be termed a writ of execution, it does not follow that the same incidents attend it as attend the process issued to enforce a common-law judgment. The character of the writ is to be determined by the functions to be performed under its authority, rather than by its name.

In order to enforce the writ of execution which is issued upon a common-law judgment, it is necessary for the officer, before he can sell the property of the defendant, to indicate, by some act of his, the particular property which he intends to appropriate for that purpose. This act is called a levy, and, as we have seen, must be made in the lifetime of the writ. When, however, the judgment itself designates the property which is to be sold, there is no occasion for a levy. "The only object of a levy is to create a lien upon the land, or in other words, to subject the lands to the payment of the plaintiff's debt. If this has already been done, a levy is supererogatory. If the sale has been ordered by a court of chancery in a suit in which all the parties in interest were before the court, there is no need of any levy, for the right to sell the land has attached as a consequence of the proceedings in the suit. Hence, under a decree foreclosing a mortgage, no levy need be made on the mortgaged premises": Freeman on Executions, sec. 280. The officer, in making the sale, is only executing the directions of the court, and his act is attended with the same result as his sale after a levy under a common-law execution. In both cases, the property has been specifically impressed with the burden of satisfying the judgment, and the judgment debtor is not affected by the time within which this sale shall be made.

The same reasons which uphold the validity of a sale by the sheriff after the return day of the writ, where the levy was

made in its lifetime, uphold a sale in cases where no levy is required. Having the right to subject the property to a sale for the satisfaction of the judgment, the time within which it may be done is but directory, and under the control of the court. The court has at all times such control of its process as to prevent it from becoming a source of injury, but in the absence of some showing that injury has resulted from a delay in making the sale, it should not be set aside merely because it was not made before the return day of the writ. As the ground upon which the respondent herein asked to have the sale set aside was, that it was made after the return day of the writ, and as this was the only ground upon which the court made the order, it should be reversed.

It is so ordered.

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**EXECUTION SALE AFTER RETURN DAY.** — The rule established by the weight of authority is, that in the absence of a statutory provision expressly forbidding it, either real or personal property may be sold after the return day of the execution if it has been previously levied upon. A note discussing the history and development of the law relating to this subject in the United States is appended to *Young v. Smith*, 76 Am. Dec. 83-89. Wherever statutes have made a judgment a lien upon the lands of the judgment debtor, it is generally held that a levy is unnecessary to bind the lands, and that the execution comes as a power to sell merely. As this doctrine is approved in the case of *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256, it appears to be quite unnecessary, for the purpose of reaching the conclusion of the principal case, to resort, with Mr. Justice Harrison, to the distinction between a common-law judgment and an equitable decree for the sale of specific property. A judgment being a lien on the debtor's lands in California, it seems to follow, as a matter of course, that the sale may be made at any time during the existence of the lien, and that the validity of such sale depends rather upon the section of the code (671), which declares the judgment to be a lien, than upon any essential difference between the proceedings prescribed in section 684 and those referred to in the previous sections which the court cites. The doctrine set forth in the passage from section 280 of Freeman on Executions is apparently adopted by Mr. Justice Harrison as a correct statement of the law, and this being so, it is difficult to see why he should have sought a reason for his decision, which has the unfortunate result of compelling him to assert that the "writ" mentioned in the clause of section 684 of the Code, which prescribes the method by which the sale of property under a judgment is to be effected, is not the same as the "writ of execution" mentioned in the first clause of the same section. Only the most cogent reasons could justify such a harsh construction, and the remarks of the court have failed to convince us of its necessity. It would seem to be far more probable that the codifiers framed the section under discussion with a full understanding of the consequences of declaring a judgment to be a lien upon the debtor's lands, and that among those consequences, they intended that lien to be equivalent to an actual levy wherever the validity of a sale should be drawn in question. The decision might, we think, have been more appropriately put upon the simple

and intelligible principles that under a code like that of California, the time fixed for the return of the writ of execution is immaterial in such a case as the present, because the subsistence of the lien is entirely independent of the length of the period which may elapse before the writ is returned, and that the sale may therefore take place at any time at which, under the old practice, it could have taken place after a levy duly made.

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## ANDERSON v. YOAKUM.

[94 CALIFORNIA, 227.]

**DEEDS — QUITCLAIM — COVENANT AS TO AFTER-ACQUIRED TITLE.** — A quitclaim deed to state lands, made after a party has prepared but before he has filed his application to purchase, passes no interest therein to his grantee; and a covenant in the *habendum* clause, that any after-acquired title shall vest in the grantee, will not of itself vest such title in the grantee upon its acquisition by the grantor.

*Justin Jacobs*, for the appellant.

*Charles G. Lamberson*, for the respondents.

**GABOUTTE, J.** This is an action to quiet title. Plaintiff appeals from the judgment and order denying her motion for a new trial. Respondents are successors in interest of one McKenna. At the time McKenna prepared his application to purchase the land involved in this litigation from the state, and prior to the filing of such application, he remised, released, and quitclaimed his interest in the property to appellant, by deed duly executed and acknowledged. The *habendum* clause in said deed was as follows: "To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns forever, and also any estate, right, title, or interest which the said party of the first part may hereafter acquire in and to the above-described premises." Subsequently to the date of said deed, McKenna's application to purchase was approved, a certificate was issued to him, and his assignee of such certificate obtained the patent, which now rests in the respondents.

The only question involved in this appeal is, Did the deed of McKenna to plaintiff vest his after-acquired title in her? In other words, did the certificate of purchase to McKenna inure to the benefit of plaintiff by reason of her deed? In *Cadiergues v. Duran*, 49 Cal. 356, it was expressly decided that a party who has simply filed his application to purchase has no interest in the realty subject to transfer; and to the same



effect is *People v. Blake*, 84 Cal. 614. In *Morrison v. Wilson*, 80 Cal. 344, it was held that words used in a deed conveying the property in fee-simple absolute will be construed to convey only the present interest of the grantor, and not to pass an after-acquired title, if a clause is inserted declaring that as to title it is only a quitclaim deed; and to the same effect is *Montgomery v. Sturdivant*, 41 Cal. 290.

While these cases sustain the principle that the legal effect of words of conveyance may be limited and restricted by subsequent recitals in a deed, we have been referred to no case holding that a covenant by a grantor in a deed of quitclaim and release that any after-acquired title shall vest in the grantee has the effect of itself to vest such title in the grantee upon its acquisition by the grantor. The *habendum* clause of a deed refers to and acts upon the interest conveyed, most frequently limiting and qualifying such interest, but, as we have already shown, the grantor here had no interest whatever in the realty at the date of his deed to plaintiff, and it follows that no title, either present or future, vested in her through this conveyance.

Let the judgment and order be affirmed.

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THE EFFECT OF CONVEYANCE BY QUITCLAIM DEED is discussed at length in the note to *Thorn v. Newsom*, 53 Am. Rep. 749-752.

QUITCLAIM DEED DOES NOT PASS AFTER-ACQUIRED TITLE: See note to *Frisk v. Darst*, 53 Am. Dec. 536, 537, where cases showing what covenants have been held insufficient to pass a subsequently acquired title will be found cited. In Texas, however, it has been held that a conveyance of a part of a tract surveyed but not patented will operate as a conveyance by estoppel of both the legal and equitable title to the land upon the issuance of patent therefor to the grantor: *Abernathy v. Stone*, 81 Tex. 430.

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[IN BANK.]

## MONTGOMERY v. PACIFIC COAST LAND BUREAU.

[94 CALIFORNIA, 284.]

### AUCTION SALE OF LAND—PRINTED CATALOGUE—WARRANTY OF TITLE—

When the terms of an auction sale are announced in advance, by means of a printed catalogue, describing different tracts of land belonging to different persons, stating the terms of sale at the end of each description, and concluding with a statement warranting the title perfect, allowing time for search, and requiring a partial payment upon the fall of the hammer, the concluding statement in the catalogue becomes a part of the terms of sale of each tract of land described therein.

**AUCTION SALE OF LAND — AUTHORITY AND LIABILITY OF AUCTIONEER —**

**AGENCY — RATIFICATION.**— When one sells the land of another at auction, assuming to act as his agent, and receives a portion of the purchase-money, which he returns to the purchaser because of an alleged defect in the title, after the owner has tendered a deed to the purchaser, and has notified the agent in writing not to return the money, the acts of the owner are such a ratification of the agent's acts as will entitle the former, upon showing a good record title, to recover of the latter the purchase-money returned, as money received and had to the use and benefit of the former.

**PRINCIPAL AND AGENT — PRESUMPTION AS AGAINST ASSUMED AGENT. —**

Where one sells the land of another under an assumed authority to do so, this, as against him, is *prima facie* evidence of written authority; and when the question of agency becomes material, the burden of proof is upon him to rebut the presumption arising from his claim of authority.

**PUBLIC LANDS ENTERED UNDER POWER OF ATTORNEY AUTHORIZING THEIR**

**CONVEYANCE. —** A United States patent to land as an additional soldier's homestead, the entry for which was made in the name of the soldier by his attorney in fact, acting under an irrevocable power of attorney, executed two years previously, and containing a relinquishment of dower, is valid. Although the land was conveyed in the soldier's name alone, after entry and approval, but before the issuance of the patent, a grantee, claiming under such patent, has a perfect title, good at law, and secure against a suit in equity to annul the patent.

**VENDOR AND VENDEE — ATTORNEY'S ERRONEOUS OPINION AGAINST TITLE. —**

An erroneous opinion of counsel of admitted standing and ability that the title to land purchased is invalid will not justify a purchaser in receding from the contract of sale, when the title is in fact perfect and a conveyance is tendered.

**AUCTION SALES OF LAND — LIABILITY OF AUCTIONEER — MEANING OF**

**PRINTED TERMS OF SALE. —** When an auctioneer sells land under the printed terms of a catalogue, and receives a portion of the purchase-money, which he returns to the purchaser because of an alleged defect in title after a tender of proper conveyance by the owner, and written notice not to return the money, the opinion of attorneys who pronounced the owner's title unsafe, and evidence as to the meaning of the printed terms of the sale, are not admissible in an action by the owner against the auctioneer to recover the money returned by him to the purchaser.

*Hunsaker, Britt, and Goodrich, and Zach Montgomery, for the appellant.*

*Wellborn, Stevens, and Wellborn, and Wellborn, Parker, and Stevens, for the respondent.*

**BEATTY, C. J.** In April, 1886, the defendant, a California corporation, was engaged at the city of San Diego in the business of selling lands upon commission. On the 24th of that month, it sold at public auction to A. and S. Hart a tract of land belonging to the plaintiff for nine thousand dollars. The terms of sale were announced and advertised in advance by means of a printed catalogue, in which a number of different

tracts belonging to different owners were described. At the end of each description were stated the terms upon which it would be sold, i. e., the portion of the price to be paid in cash, time of payment of balance, and rate of interest on deferred payments. The terms of sale of plaintiff's land so announced were as follows: "Terms, one half cash, balance in one to three years, and interest at ten per cent." After the description of other tracts to be sold on different terms as to credits, and at the end of the catalogue, was the following:—

"Title perfect. Instruments of sale at purchaser's expense. Ten days allowed for search of title. A deposit of ten per centum will be required on the fall of the hammer; balance of cash payment on delivery of deed, and if not so paid (unless for defect of title), then said ten per centum to be forfeited, and the sale to be void. For maps, catalogues, and further particulars, apply to Pacific Coast Land Bureau, branch office, Sixth Street, San Diego.

"R. J. PENNELL, Auctioneer."

We remark, in passing, with respect to a question that seems to be raised in the argument, that there is, in our opinion, no doubt that this last-quoted portion of the catalogue applies generally to each separate tract described therein, and not merely to that one which immediately precedes it. We hold, in other words, that it states in part the terms of sale of plaintiff's tract of land, as well as of others described in the catalogue.

Such, indeed, seems to have been the construction acted upon by all parties to the transaction, for immediately ensuing the sale the Harts paid to defendant the sum of nine hundred dollars,—ten per cent of the purchase price,—and they at the same time placed in the hands of their legal advisers an abstract of plaintiff's title to the land for the purpose of obtaining their opinion as to its validity. Being advised that the title was defective, they, or their attorneys, stated their objections to representatives of the plaintiff, who insisted, notwithstanding such objections, that his title was perfect, and demanded the completion of the sale. In this connection he tendered a deed of conveyance to the purchasers, to the sufficiency of which they made no objection, but which they declined to accept, solely upon the ground that the title of plaintiff was not perfect. Upon the same ground they demanded of the defendant the return of the nine hundred

dollars deposited at the time their bid was accepted. In compliance with this demand, the defendant, after being notified by plaintiff not to do so, returned said nine hundred dollars to the Harts, and the plaintiff thereupon commenced this action to recover the same as money had and received to his use.

The cause was tried without a jury, the findings and judgment of the superior court were in favor of defendant, and plaintiff's motion for a new trial was denied. The appeal is from the judgment, and from the order denying a new trial.

The complaint alleges in general terms the receipt by defendant of nine hundred dollars to the use of plaintiff, and the answer and finding of the court negative this allegation. The findings therefore support the judgment. But the appellant contends that the refusal of a new trial was erroneous, because the superior court erred in admitting evidence over his objections, and because the evidence properly admissible does not sustain the findings.

There is included in the bill of exceptions an opinion of the superior judge, delivered prior to the filing of his findings of fact and conclusions of law, which shows very clearly that the principal ground of his decision was, that plaintiff's title, although it may be good, was not so free from doubt as to enable him to enforce its acceptance by the purchasers of the land. He also holds, apparently, that according to the evidence, the nine hundred dollars in controversy was not received by defendant for plaintiff's use, but solely for the use and benefit of the defendant itself. In addition to these grounds, upon which the decision of the superior court is rested in the opinion referred to, the respondent contends that the order denying a new trial must be affirmed, for the reason, if for no other, that there was no evidence that plaintiff ever gave the defendant written authority to sell his lands, and consequently that it does not appear that defendant was the plaintiff's agent in the sale of said land, or that the ten per cent of the purchase price was received for his use or benefit.

It is true that the record contains no direct evidence of an antecedent written authorization to defendant to make the sale, and we concede that without such antecedent written authority, or a subsequent ratification by plaintiff of the sale made in his name before the return of the money to the purchasers, he could not have claimed it of the defendant. But here there is evidence of such ratification. Before the money

had been returned (June 21, 1886), the plaintiff had tendered a conveyance (May 28, 1886) to the purchasers, and had notified the defendant in writing not to return the money. Aside from this, we think that, as against one who assumes to be the agent of another, that fact is sufficient *prima facie* to justify the inference that he was duly authorized to do what he claimed the authority to do, and that where the question of agency in fact becomes material, the burden is upon him to rebut the presumption arising from his claim of authority. In other words, we hold that where one sells land of another, claiming authority to do so, this, as against him, is at least *prima facie* evidence of written authority.

As to the grounds upon which the superior court expressly rested its decision, we think that neither is sufficient to sustain it. The evidence shows that the title of the plaintiff to the land in controversy was in fact perfect, and that this appeared from the abstract and public records of San Diego County at the time of the sale. The land, a tract of eighty acres, had been patented by the United States as an additional soldier's homestead. The entry was made in the name of the soldier, Cook, by his attorney in fact, acting under an irrevocable power dated two years before the entry, to which was added a relinquishment of dower by Cook's wife. After the entry and its approval, but before patent, the land was conveyed in the name of Cook to plaintiff's grantor. It was admitted that the legal title was in the plaintiff, but, in the opinion of the lawyers who advised the Harts, the terms of the power under which the land had been entered and conveyed, and the circumstances of the transaction, were such as clearly to evince, and to put any purchaser upon notice, that Cook had virtually and in effect made an assignment of his homestead right before the entry, contrary to the terms, or at least to the clear policy of the law of the United States; that the patent had therefore been fraudulently obtained, and could at any time be annulled at the suit of the United States.

This opinion, we think, was erroneous. In the case of *Ross v. Nevada etc. Lumber Co.*, 73 Cal. 385, this court decided that a patent of the United States issued under similar circumstances was not void, and placed its decision upon the ground that there had been no violation of the terms or the spirit of the law. Upon the same ground, it must be held that plaintiff's title is not only good at law, but that it is secure against a suit in equity to annul the patent.

But the superior court, irrespective of the question of the actual validity of the title, which it held not to be necessarily involved, decided that the purchasers were justified in refusing the conveyance and in demanding back their deposit, and therefore that defendant was bound to restore it, because of the opinion of counsel of admitted standing, ability, and reputation that the title was not safe. We think, however, that upon the authority of *Winter v. Stock*, 29 Cal. 413, it must be held otherwise.

A purchaser of real property does well to obtain professional advice as to the validity of the title, but he must take the risk of the soundness of the advice upon which he acts. It may turn out to be erroneous, and if so, the fact that it was given and acted upon in good faith will not exempt him from damages for the breach of his contract. None of the later cases cited by respondent are in conflict with this view. We have not been cited to any decision, and we know of none, which holds that where the facts are all admitted and appear of record, an erroneous opinion that a title is invalid will justify a purchaser in receding from his bargain.

From this view of the law, it follows, as a necessary consequence, that when the plaintiff's title was shown to be perfect, and he tendered a sufficient conveyance, he became entitled to demand and receive from the purchasers the cash payment provided for in the terms of sale; and as a part thereof, the nine hundred dollars in the hands of defendant, less its proper charges and commissions.

It may be conceded that as to this deposit the defendant, pending the examination of the title, was a stake-holder for the parties and for its own protection. But when the title was shown to be perfect, the deposit then became, according to the terms of sale, a portion of the cash payment, and the property of the plaintiff, less the charges and commissions of the defendant. Thereafter the defendant could not return it to the purchaser except at its own risk. Having done so, and having made a mistake, it cannot escape its just liability to the plaintiff.

We think the court erred in admitting in evidence the opinions of the attorneys who pronounced plaintiff's title unsafe, and in admitting evidence as to the meaning of the printed terms of the sale. We also think that on the evidence the findings and judgment should have been for the plaintiff.

The judgment and order appealed from are reversed.

**AUCTION SALE OF REALTY.** — For sales of realty at auction, as well as the authority, powers, and liability of auctioneers, see note to *Thomas v. Kerr*, 96 Am. Dec. 264-272. When bidders for village lots offered for sale at public auction are referred to plats of the same, the reference is the assertion of a positive fact, which if material enters into the consideration: *McCall v. Davis*, 56 Pa. St. 431; 94 Am. Dec. 92. But conditions of sale read before the biddings commenced, but not annexed to the catalogue on which the purchasers' names were entered, or referred to therein, cannot be held to supply the terms of sale omitted from the catalogue: *Johanson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243. The advertisement of a public sale is no part of the conditions of the sale, unless expressly made so, the object of it being merely to give notice of the sale: *Ashcom v. Smith*, 2 Penr. & W. 211; 21 Am. Dec. 437.

**VENDOR AND PURCHASER — ATTORNEY'S OPINION OF THE TITLE.** — While a purchaser of realty is entitled to a marketable title free from reasonable doubt (*Dingley v. Bon*, 130 N. Y. 607; *Sheeky v. Miles*, 93 Cal. 238), a contract that the title shall be first class, and shall be passed upon by the purchaser's lawyer, does not make the decision of such lawyer a condition precedent to the right of the vendor to enforce the contract, if in fact the title is good: *Vought v. Williams*, 120 N. Y. 253; 17 Am. St. Rep. 634. In *Aultman v. Utsey*, 34 S. C. 559, it was decided that the subsequent approval of title by her attorney did not relieve a grantee under a quitclaim deed of the consequences of a failure to make inquiry at the time of the purchase.

**AGENCY — AGENT'S RESPONSIBILITY TO PRINCIPAL.** — An agent under full authority, who entered into a valid contract for the disposal of his principal's property, has no authority to surrender such contract or release the purchaser from payment, there being no controversy as to the binding effect of the contract; and in case he does so, the agent must account to his principal on the basis of the condition of affairs just prior to the surrender: *Kounts v. Gates*, 78 Wis. 415.

**PUBLIC LANDS — SOLDIER'S ADDITIONAL HOMESTEAD.** — In accord with the rule of the principal case is *Ross v. Nevada etc. Co.*, 73 Cal. 335, cited with approval therein. However, in *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20, a contrary doctrine was laid down, to the effect that the right of a soldier to an additional homestead under the statutes of the United States is inalienable before such right is perfected, and if a power of attorney is given by a soldier to convey lands of which he may become seised, including any which may be located under soldier's additional homestead act of June 8, 1872, and if thereafter an entry is made in his name, followed by a conveyance by his attorney in fact, acting under such power of attorney, and afterwards final proof is made and a patent issued, such conveyance is void. In *Stewart v. Sutherland*, 93 Cal. 270, the court held that after an entry is made, and before the patent is issued for a soldier's additional homestead, he may sell the land and pass title thereto.

[IN BANK.]

## PEOPLE v. NY SAM CHUNG.

[44 CALIFORNIA, 304.]

**CRIMINAL LAW — FORMER JEOPARDY. — CONVICTION OR ACQUITTAL OF MINOR OFFENSE** is a bar to a prosecution for the same act charged as a higher offense, whenever the defendant on trial of the latter might be be legally convicted of the former had there been no other prosecution.

**CRIMINAL LAW — FORMER JEOPARDY — DISMISSAL OF MINOR CHARGE AFTER TRIAL AND BEFORE JUDGMENT. —** When a defendant is tried upon a charge of petit larceny by a court of competent jurisdiction, and upon the conclusion of the evidence, the court, believing that another crime has been committed, refuses to render judgment, and dismiss the charge of its own motion, the defendant has been placed in jeopardy, and the proceedings are a bar to a subsequent prosecution against him for grand larceny upon the same facts.

**CRIMINAL LAW — FORMER JEOPARDY NOT AFFECTED BY ERROR. —** Where jeopardy has attached, the defendant cannot be deprived of the benefit of such jeopardy by the refusal of the court to proceed to render judgment, and its dismissal of the charge, even though the court is aware that by reason of an error of law committed on the trial, or by reason of the insufficiency of the evidence to support the charge, a mistrial will be the necessary result.

**CRIMINAL LAW — FORMER JEOPARDY — VOIDABLE JUDGMENT. —** Under a voidable judgment of conviction the defendant is in jeopardy, and such judgment is a bar to further prosecution on the same facts for the same or a higher offense necessarily including the former, until such judgment is reversed or set aside.

*Robert Ferral and F. E. Stranahan*, for the appellants.

*W. H. H. Hart*, attorney-general, *W. H. Layson*, deputy attorney-general, and *J. A. Hosmer*, assistant district attorney, for the respondent.

**GAROUTTE, J.** The defendants were prosecuted in the police court of the city and county of San Francisco for the offense of petit larceny in stealing one gold bracelet of the value of twenty-seven dollars, the property of Jeong Koong. A jury trial was waived, and after the evidence was concluded, upon the suggestion of the prosecuting attorney that the property was taken from the person of said Koong, and that therefore the offense was grand larceny, the court ordered the action dismissed. The defendants were thereafter placed upon trial in the superior court upon a charge of grand larceny, upon an information alleging the same facts set out in the complaint in the police court, and the further fact that the property was taken from the person of said Jeong Koong. In addition to their plea of not guilty, they plead that they had been once in



jeopardy, and the determination of that question is the only matter involved upon this appeal.

The solution of the question as to whether a defendant has been placed in jeopardy in many cases is a matter of considerable difficulty, especially in the light of the variance existing in the decisions of the courts upon the subject. Bishop in his work on criminal law, section 1027, states the general rule to be: "When the indictment is sufficient, and the proceedings are regular, before a tribunal having jurisdiction, down to the time when the jeopardy attaches, there can be no second jeopardy allowed in favor of the state on account of any lapse or error at a later stage." In Bennett and Heard's *Leading Criminal Cases*, 537, the correct rule for the determination of the question as to the existence of a prior jeopardy for the same offense is thus stated: "A former conviction or acquittal of a minor offense is a bar to a prosecution for the same act, charged as a higher crime, whenever the defendant on trial of the latter might be legally convicted of the former had there been no other prosecution." The author illustrates by saying: "If, therefore, a person has been indicted and convicted of manslaughter, he cannot be again prosecuted for the same homicide charged as a murder; for though these crimes are not exactly the same, yet as the person when on trial for murder might, under the rules of law, have been convicted of manslaughter if the evidence failed to sustain the more serious offense, it would follow that if he had been already convicted of manslaughter in a prior indictment for that crime alone, he might on the trial for murder be convicted of the same identical crime, and thus be punished twice." The correctness of the converse of the foregoing rule is even more manifest, viz., a conviction or acquittal of a higher offense is a conviction or acquittal of all lesser offenses necessarily included therein. Bishop on Criminal Law, section 1057, fully indorses the principle laid down in the authority just quoted. The author says: "Where the conviction or acquittal is upon an indictment covering no more than one of the smaller crimes included within a larger, will it bar fresh proceedings for the larger? If it will not, then the prosecutor may begin with the smallest and obtain successive convictions, ending with the largest; while if he had begun with the largest, he must there stop,—a conclusion repugnant to good sense." The same principle is declared in Wharton on Criminal Law, sec. 563.

In the case of *State v. Wiles*, 26 Minn. 381, we find the facts and the legal principles similar to those involved in this appeal. The defendant was convicted of a misdemeanor, by a justice of the peace, in stealing a hat of the value of four dollars. Subsequently, he was prosecuted for a felony in stealing the hat from a shop. The court held that the first conviction was a bar to the second prosecution, petit larceny being necessarily included in the second offense charged. In this case, the defendants are charged with grand larceny in stealing a bracelet of the value of twenty-seven dollars from the person of one Koong. This offense as necessarily includes petit larceny as the stealing of a hat of the value of four dollars from a shop includes petit larceny, or as the offense of an assault with a deadly weapon includes a simple assault. Aside from the question of jeopardy, there can be no doubt that, under the information filed against the defendants in this case, they could have been convicted of petit larceny if the evidence at the trial had failed to show that the property was taken from the person of said Koong. It follows, that if defendants were placed in jeopardy by reason of the proceedings in the police court, their trial in the superior court was a second jeopardy, and they are entitled to their discharge. It appears the defendants were tried upon a charge of petit larceny by a court of competent jurisdiction; and upon the conclusion of the evidence, the court, believing that another offense had been committed, refused to render a judgment, but dismissed the action of its own motion. If the evidence in the case proved a petit larceny, the court should have found the defendants guilty; if the proof was lacking to establish such offense, it should have found the defendants not guilty. Jeopardy had attached to them long before the court dismissed the action, and it could not deprive them of any benefit to be derived from that jeopardy by refusing to allow the case to go to judgment, even though it was aware that by reason of an error of law committed during the progress of the trial, or by reason of insufficiency of the evidence to support the charge, a mistrial would be the necessary result. In this case, if the police court had rendered a judgment of conviction, it would not have been void, but voidable only. Under a voidable judgment of conviction, a defendant is not only in jeopardy, but in jail, and such a judgment accomplishes all the purposes contemplated by any judgment until successfully attacked.

There is no good reason to be urged that after these pro-

ceedings in the police court the defendants could have been again arrested and tried upon the charge of petit larceny upon the same facts. Such a prosecution could have been had unless the previous proceeding caused jeopardy to attach. It is thus apparent that jeopardy did attach, and, under the standard authorities which we have cited, it was a fatal bar to the prosecution in the superior court. The case of *People v. Hunkeler*, 48 Cal. 331, is directly in point upon many of the matters herein discussed.

Let the judgment and order be reversed, and the cause remanded, with directions to discharge the defendants and dismiss the proceedings.

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**FORMER JEOPARDY.**—Where the offense on trial is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to a prosecution for the other: *State v. Cross*, 101 N. C. 770; 9 Am. St. Rep. 53, and note. See also *McDonald v. State*, 79 Wis. 651; 24 Am. St. Rep. 740, and note; *In re Allison*, 13 Col. 525; 16 Am. St. Rep. 224; *People v. Pearl*, 76 Mich. 207; 15 Am. St. Rep. 304, and note; *Jones v. State*, 66 Miss. 380; 14 Am. St. Rep. 570, and note; *State v. Ward*, 48 Ark. 36; 3 Am. St. Rep. 213, and note. Whenever an accused has been once placed on trial on a valid information, before a legal jury, and in a court of competent jurisdiction, he has been placed in jeopardy, and cannot again be tried for the same offense, unless the jury was prevented from rendering a verdict by some legal necessity: *People v. Smalling*, 94 Cal. 112. Jeopardy does not commence until the jury is empaneled and sworn, so that a *nolle prosequi* before that time is without prejudice to a new proceeding for the same offense: *State v. Paternó*, 43 La. Ann. 514; nor does a discharge on a preliminary examination before a magistrate on a charge of which he has no final jurisdiction bar a subsequent arrest and examination for the same offense: *Ex parte Crawlin*, 92 Ala. 101. An acquittal before a mayor's court of an offense of which such court had no jurisdiction is not a bar to a prosecution of the same offense before a court of competent jurisdiction: *McNell v. State*, 29 Tex. App. 48.

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## STEINHART v. NAT. BANK OF D. O. MILLS & Co.

[94 CALIFORNIA, 302.]

**PAYMENT—WHAT IS NOT.**—An action against a bank to recover the amount of an undorsed note cannot be maintained, when it appears that the bank received the note for collection, and upon presenting it to the maker, who was a customer of the bank, he indorsed upon it, "Please charge the same to my account," and the evidence shows that he was at the time a debtor of the bank, but the latter, supposing him to be in good credit, charged the amount of the note to his account, marked it canceled, and afterwards on the same day, upon discovering that he was insolvent and had assigned his property for the benefit of his creditors,

indorsed the note as "charged in error," "canceled in error," and obtained from the post-office and canceled a check for the amount of the note drawn by it in favor of the payee, and immediately returned the note to him, with a letter advising him of the facts. Such transaction by the bank, unknown to the payee, does not constitute a payment of the note, nor deprive him of his right of action thereon against the maker, and in such action the mutilation of the note by the bank may be explained and accounted for.

**PAYMENT — RESCISSION OF CONTRACT TO ADVANCE MONEY TO MAKE.** —

Where a bank has contracted with the maker to advance money to pay a note, unknown to the payee, the bank may rescind the contract at any time before actual payment is made, on the ground that its consent to the contract was given by mistake.

**PAYMENT — NOTE OR CHECK FOR ANTECEDENT DEBT.** — When a creditor takes a note or check for an antecedent debt, it does not operate to extinguish the debt, unless it is received by express agreement as payment.

**PAYMENT — RESCISSION OF CONTRACT TO MAKE.** — Where a bank has contracted with the maker, unknown to the payee, to advance money to pay a note, and has rescinded the contract before payment, because of the assignment in insolvency of the maker on the same day, evidence that the assignment was made that day, and as to how long it took to prepare it, is admissible in an action by the payee to recover the amount of the note from the bank, when other evidence shows that on the morning of the same day the maker thought he was able to pay all his debts in the usual course of business.

*Rothchild and Ach*, for the appellants.

*Denson and Oatman*, for the respondent.

**BELCHER, C.** This is an action to recover the sum of \$860, money alleged to have been received by the defendant to and for the use of the plaintiffs. The court below gave judgment for the defendant, from which, and from an order refusing a new trial, the plaintiffs appeal.

The facts of the case, as found by the court, are as follows: —

On the seventeenth day of December, 1888, one G. Politz made his promissory note to the plaintiffs for \$860, payable two months after date at the bank of defendant. They delivered it to the London, Paris, and American Bank of San Francisco for collection, which bank forwarded it to the defendant at Sacramento to be presented for payment, and it was received Sunday, the seventeenth day of February, 1889. The maker was a customer of the defendant, and on the morning of the 18th he deposited with the defendant four hundred dollars on general account. While he was at the bank, at the time he made the deposit, a clerk of the defendant presented the note for payment. The maker wrote across the face of the note, "Please charge the same to my account.

G. Politz." The clerk then wrote on the back of the note, "Charged account. Littlefield." The clerk, Littlefield, then stamped these words on the back of the note, within a square: "National Bank of D. O. Mills & Co., February 18, 1889, Sacramento, Cal." The square and words were in red ink, and understood to mean "canceled." The clerk then charged the amount of the note in the pass-book of the maker, and in the journal of the defendant in his account. Before the close of the business hours of the day, the defendant drew its check in favor of the London, Paris, and American Bank upon the Bank of California, and after the close of business hours, inclosed its check in an envelope, with a letter of advice addressed to the London, Paris, and American Bank. At the time of this transaction, Politz had no money or other funds on deposit with the defendant. Some time previous he had made his note, payable one day after date, to the defendant, to cover over-drafts, for the sum of three thousand five hundred dollars, which was accredited to his account. Allowing this note as a credit in account with Politz, and charging him with the amount of said check, the journal of the defendant at the close of the business hour on that day showed a nominal credit in his favor of \$367; but in fact, he had overdrawn his account in excess of his note, then overdue, and moneys deposited more than \$2,000. At the time the defendant received from Politz the note for three thousand five hundred dollars, to cover over-drafts, he was in good credit, but in fact insolvent, and was insolvent on the eighteenth day of February, 1889, at the time of the transaction out of which this action arose; and about five o'clock of the afternoon of that day, he made a general assignment under the provisions of the Civil Code for the benefit of his creditors. The defendant knew nothing of the insolvency of Politz until after the assignment was made. On the same day and immediately after ascertaining that he had made an assignment, the defendant procured the envelope from the post-office containing the check, and canceled it, and immediately indorsed on the back of the note these words: "Charged in error. F. Miller, Cashier." "Canceled in error. F. Miller, Cashier." And immediately, on the same evening, returned the note by mail, with letter of advice as to what had been done, to the London, Paris, and American Bank of San Francisco. There were no indorsers on the note due plaintiffs. Neither the plaintiffs nor the London, Paris, and American Bank knew or had any notice of the transaction between

the defendant and Politz, or of the drawing of the draft by the defendant, until after the check had been canceled and the defendant had declined to advance the money to pay the note. The defendant did not receive any money or other valuable thing from Politz, to or for the use of the plaintiffs, and they have lost no rights by the acts of the defendant.

Upon these facts, the principal question presented for decision is, Did the transaction between Politz and the defendant constitute a payment of the note? The appellants contend that it did, and that the finding that "the defendant did not receive any money or other valuable thing from Politz to or for the use of the plaintiffs, and they have lost no rights by the acts of the defendant," was not justified by the evidence.

The above is the only finding objected to, and we do not think the contention in regard to it can be sustained.

It is not disputed that when the note was presented to Politz for payment, and he wrote on it, "Please charge the same to my account," he had no money in the bank to his credit, but was indebted to it in a considerable sum. The request was, therefore, in effect, that the defendant advance or loan to him the money to make the payment, and trust him till he could pay it back. This the defendant, supposing him at the time to be of good credit, seems to have been willing to do, but when, near the close of the business day, it learned that he had made an assignment for the benefit of his creditors and was insolvent, it changed its mind, and concluded not to advance the money. It thereupon got back its check and canceled it.

At this time the transaction was unknown to the plaintiffs, and was incomplete, and as against Politz, the defendant had a clear right, we think, to do as it did.

And if it be assumed, as claimed by appellants, that the transaction amounted to a contract on the part of defendant to advance the money to pay the note, still it had a right to rescind the contract if its consent thereto was given by mistake (Civ. Code, sec. 1689), and that it was so given is shown by the evidence and findings.

As against the plaintiffs, the test as to whether the note was paid or not is, Could they afterwards have maintained an action upon it against Politz, the maker? It is settled law in this state, that when a creditor takes a note or check for an antecedent debt, it does not operate to extinguish the debt, unless it is received by express agreement as payment: *Grif-*

*fith v. Grogan*, 12 Cal. 317; *Welch v. Allington*, 23 Cal. 322; *Brown v. Olmsted*, 50 Cal. 162; *National Bank v. McDonald*, 51 Cal. 64; 21 Am. Rep. 697; *Comptoir d'Escompte v. Dresbach*, 78 Cal. 15. If, then, the check of the defendant had been forwarded to and actually received by the plaintiffs, it would not, until collected, have paid their note and released the maker from liability thereon. And the fact that the note was mutilated, and marked "canceled," did not affect the plaintiff's right to sue upon it, since this matter could all be explained and accounted for: Code Civ. Proc., sec. 1982.

In our opinion, therefore, the note was not paid, and the finding objected to was justified and proper.

The appellants also make the point that the court erred in the admission of evidence. Politz was called as a witness for defendant, and testified that he made an assignment on the eighteenth day of February, 1889. He was then asked by counsel for defendant: "How long were you preparing or having that assignment prepared?" The question was objected to as irrelevant and immaterial; the objection was overruled, and an exception taken. The witness answered: "It took my lawyer about half an hour to write it. I went to him about four o'clock. I had a consultation with my legal adviser about my affairs before that. I think it was the same morning." The witness then went on to say that his consultation in the morning was not about making an assignment, and that he then thought he was able to pay all his debts in the ordinary course of business.

We are unable to see that there was any error in the ruling complained of, and if there was, that the appellants were in any way prejudiced thereby.

We think the judgment and order should be affirmed, and so advise.

VANCLIEF, C., and FOOTE, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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PAYMENT. — A note is not an extinguishment or payment of a precedent debt, unless there is an express agreement to accept it as payment, and to take the risk of the insolvency of the maker: *Tobey v. Barber*, 5 Johns. 68; 4 Am. Dec. 326; *Reed v. Van Ostrand*, 1 Wend. 424; 19 Am. Dec. 529; *Estute of Davis*, 5 Whart. 530; 34 Am. Dec. 574; *Weymouth v. Sandorn*, 43 N. H. 171; 80 Am. Dec. 144. The same rule prevails in regard to checks drawn by

a debtor in favor of his creditor: *National Bank v. Chicago etc. R. R. Co.*, 44 Minn. 224; 20 Am. St. Rep. 566.

A CONTRACT BETWEEN TWO PERSONS FOR THE BENEFIT OF A THIRD may be rescinded at any time before he has accepted it: *Jordan v. Lavery*, 53 N. J. L. 15. So, also, when a bank delivers to another bank money and securities to pay a creditor, and the account is kept in the name of the depositing bank absolutely, and not as trustee for the creditor, the bank making the deposit may withdraw it at any time before the creditor has notice of the transaction: *Brohmeyer v. Washington Nat. Bank*, 40 Kan. 744.

ALTERATION OF AN INSTRUMENT BY A STRANGER does not change its legal operation so long as the original writing remains legible; *Bridges v. Winters*, 42 Miss. 125; 97 Am. Dec. 443; *Pierce v. Grimes*, 30 Ind. 129; 95 Am. Dec. 672.

## KRAUSE v. SPIEGEL.

[94 CALIFORNIA, 570.]

**MALICIOUS PROSECUTION OF NON-CRIMINAL CHARGE. — ARREST AND IMPRISONMENT** of a person on a charge which does not constitute a crime is not a cause of action for malicious prosecution.

**MALICIOUS PROSECUTION FOR SLANDER. — FALSE IMPRISONMENT. — A person** arrested and imprisoned on a charge of slander has a cause of action for false imprisonment, but not for malicious prosecution.

*F. J. Kierce, and Wheaton, Kalloek, and Kierce*, for the appellant.

*James H. Budd*, for the respondent.

**BELCHER, C.** It is alleged in the complaint in this case that in December, 1887, the defendant appeared before a justice of the peace, and falsely and maliciously, and without reasonable or probable cause, made a verified complaint charging plaintiff "with having committed slander of and concerning defendant," and procured the justice to issue a warrant for the arrest of plaintiff upon said charge; that the justice issued the warrant accordingly, and plaintiff was arrested and imprisoned thereunder for six hours, when he was released by the justice upon his own recognizance; that thereafter plaintiff was examined before the justice upon the said charge of slander, and no one appearing to prosecute, he was acquitted and discharged; that the said charge and the arrest of plaintiff thereunder was extensively published by the procurement of defendant, and by reason thereof plaintiff was greatly injured in his business, credit, and reputation; that defendant well knew he had no cause for the arrest of plaintiff, and that he swore to the warrant for the purpose and with the intent of harassing and an-



noying plaintiff, and that the same did harass and annoy him; and that by reason of the premises, plaintiff suffered damage in the sum of ten thousand dollars, for which he asked judgment.

The action was commenced more than a year after the alleged discharge of the plaintiff, and the defendant demurred to the complaint, upon the grounds that it did not state facts sufficient to constitute a cause of action; that several causes of action were improperly united; and that each of the causes of action sued upon was barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure.

The court below ruled that the complaint did not state facts sufficient to constitute a cause of action for malicious prosecution, and that the causes of action stated, so far as they were for false imprisonment and libel, were barred by the provisions of the statute pleaded. The demurrer was accordingly sustained, and the plaintiff declining to amend, judgment was entered that he take nothing by his action, and that defendant recover his costs. From that judgment the plaintiff appeals.

The only question is, Did the complaint state a cause of action for malicious prosecution?

The rule is general, and supported by all the decisions and text-books upon the subject, that when one maliciously, and without reasonable or probable cause, institutes or prosecutes, in a court having jurisdiction of the matter, a criminal proceeding against another, the proceeding, when terminated in favor of the accused, furnishes the basis for an action for malicious prosecution.

In some of the states it has been held that if the court had no jurisdiction of the criminal proceeding, still an action for malicious prosecution might be maintained; but in other states a contrary rule has been declared: See 3 Lawson's Rights and Remedies, sec. 1088; 4 Wait's Actions and Defenses, 888, and cases cited.

In some cases it has been held that where one maliciously and without probable cause charged another with a crime, for which he was arrested and held to answer or put upon trial, an action for malicious prosecution would lie, though the facts charged did not constitute a crime. A leading case of this class is *Dennis v. Ryan*, 65 N. Y. 385. There the plaintiff had been indicted upon the testimony of the defendant for the crime of forgery, and acquitted upon the ground that the acts complained of did not constitute the crime alleged, or any

crime. The action was for malicious prosecution in falsely and maliciously charging and causing the plaintiff to be indicted, arrested, and tried for the crime of forgery. The plaintiff recovered judgment, and on appeal the judgment was affirmed by a divided court.

So in several cases it has been held that an action for malicious prosecution might be maintained, though the information or indictment were defective, and no conviction could be had thereunder; "for in either case, whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it": 3 *Lawson's Rights and Remedies*, sec. 1090.

This case is not like any of those before referred to. Here no criminal prosecution was commenced or prosecuted against the plaintiff. The only charge made before the magistrate was, that the plaintiff had slandered the defendant. This was not a charge of a criminal act, and it furnished no ground whatever for the issuance of a warrant of arrest. But when the warrant was issued, and the plaintiff was arrested and imprisoned under it, a cause of action for false imprisonment at once arose in his favor, and if suit had been brought in time, it could without doubt have been maintained. There is, however, a distinction between an action for false imprisonment and an action for malicious prosecution. Under the old practice, the former was called an action of trespass, and the latter an action on the case; and under our statute the former is barred in one year (Code Civ. Proc., sec. 340, subd. 3), and the latter in two years: *McCusker v. Walker*, 77 Cal. 212.

No case has been called to our attention in which it was held that an action for malicious prosecution could be maintained upon facts similar to those presented here; and there are several cases holding to the contrary.

In *Hahn v. Schmidt*, 64 Cal. 286, it is said: "In *Leigh v. Webb*, 3 Esp. 164, Lord Eldon ruled that if a party makes a complaint before a justice, which the justice conceives to amount to a felony, and issues his warrant against the party complained against, and the facts do not amount to felony, no action for malicious prosecution will lie against the party who made the complaint." And it is further said: "We are unable to find any English case in which *Leigh v. Webb*, 3 Esp. 164, has been overruled, or the soundness of the views expressed by Lord Eldon even questioned."

In *McNeely v. Driskill*, 2 Blackf. 258, it appeared that Dris-

kill had been arrested on a warrant issued by a justice of the peace on an affidavit of McNeely, which did not authorize the justice to issue it, and had been discharged. Thereupon Driskill brought an action against McNeely for wrongfully and maliciously prosecuting him on a charge of larceny, and obtained judgment. On appeal the court said: "The affidavit shows a state of facts on which an action of trover might have been maintained, but it contains no charge of larceny against any person. The appellant had lost his property and wished to recover it; he states that fact to a justice of the peace. The justice forms his judgment upon the facts stated; he issues his mandate to an officer to search for the property, and to bring the person in whose possession it may be found before himself or some other justice of the peace, etc. This was an error, but it is the error of the justice, and not of the appellant. And if a justice of the peace, by mistake of judgment, conceives an act to be felony which is not felony, and in consequence of that mistake causes an innocent person to be arrested and imprisoned, the law will not hold the person who made the complaint responsible, in this form of action, for the consequences of such errors."

In *Turpin v. Remy*, 3 Blackf. 216, the court said: "An action for a malicious prosecution can only be supported for the malicious prosecution of some legal proceeding before some judicial officer or tribunal. If the proceedings complained of are extrajudicial, the remedy is trespass, and not an action on the case for a malicious prosecution." In *Bennett v. Black*, 1 Stew. 494, it was said: "The court are of opinion that if a justice of the peace or any other judicial officer to whom application may be made for a warrant for the apprehension of offenders against the criminal law of the land was, by mistake of judgment, to conceive that to be felony which, from the facts sworn to did not amount to that offense, and should the party complained against be committed to jail, it would not subject the party complaining to an action of this sort [malicious prosecution]. If it could, it would subject every prosecutor to an action for the mistakes of the criminal judge, which is too unreasonable to be admitted." In *Newman v. Davis*, 58 Iowa, 447, the action was for malicious prosecution; and in the complaint it was alleged that the defendant, before a magistrate, "falsely, maliciously, and with intent to injure, harass, and oppress said plaintiff, made information on oath, accusing said plaintiff of using abusive language, such as

'You are a liar and thief,' and then and there maliciously, and with intent to injure, harass, and oppress said plaintiff, procured a warrant to be issued by said magistrate and placed in the hands" of a constable, and that plaintiff was arrested under the warrant and afterwards discharged. It was held on appeal that "where the complaint did not charge the commission of any specific offense, and the facts stated did not impute any crime, but the justice of the peace, by mistake of judgment, and thinking a crime was charged, caused the arrest of the party, the law will not hold the person who made the complaint responsible in an action for malicious prosecution for the consequences of such error."

But it is said in *Hahn v. Schmidt*, 64 Cal. 236, that "in order to constitute a defense to an action for malicious prosecution, the facts stated in the complaint, if they do not constitute a crime, must nevertheless be true." In support of this proposition, several cases are cited, but they are all cases in which a crime had been distinctly charged, and the facts stated were insufficient to constitute a crime. The rule declared has no application to this case.

In our opinion, the complaint here did not state a cause of action for malicious prosecution, and the demurrer was properly sustained.

We advise that the judgment be affirmed.

TEMPLE, C., and VANCLIEF, C., concurred.

The COURT. For the reasons given in the foregoing opinion, the judgment is affirmed.

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**MALICIOUS PROSECUTION.** — A note explaining what is essential to maintain an action for malicious prosecution will be found in the note to *Antcliff v. June*, 21 Am. St. Rep. 533.

If the charge had been the commission of a crime, the facts alleged in the principal case would have sustained an action for malicious prosecution, but not for illegal arrest and imprisonment: See *Haskins v. Ralston*, 69 Mich. 63; 13 Am. St. Rep. 376.

**NEITHER MALICE NOR WANT OF PROBABLE CAUSE** need be proved to support an action for false imprisonment. Evidence tending to show that plaintiff was restrained of his liberty at defendant's instance, by reason of process which the magistrate had no authority to issue, is sufficient to sustain such action: *Boeyer v. Langenberg*, 97 Mo. 390; 10 Am. St. Rep. 322. Whoever imprisons another must (except in certain cases under special statutes) justify himself by showing that the imprisonment was lawful: *Ak Fong v. Starnes*, 79 Cal. 30. A complaint against a justice of the peace for false imprisonment in punishing plaintiff for contempt must aver, in terms, that the

acts constituting the imprisonment were without or in excess of his jurisdiction, or facts from which a want of jurisdiction appears: *Going v. Dissidde*, 86 Cal. 633.

A PERSON PROPERLY ARRESTED BY LAWFUL AUTHORITY cannot maintain an action for false imprisonment against a party causing such arrest; nor is the prosecutor liable to an action where, without his agency, the warrant is placed in the hands of a person not legally competent to make an arrest: *McConnell v. Kennedy*, 29 S. C. 180.

[IN BANK.]

## COWDEN v. PACIFIC COAST STEAMSHIP COMPANY.

[94 CALIFORNIA, 470.]

**COMMON CARRIERS—FREIGHT DISCRIMINATION—VOYAGE ON HIGH SEAS—JURISDICTION.**—An action to recover damages for discrimination in freight charges by a common carrier on the high seas between different ports within the same state is exclusively within the jurisdiction of the federal or admiralty courts, unless a common-law cause of action is stated. The state courts have no jurisdiction whether the action is in contract or tort.

**INTERSTATE COMMERCE ON HIGH SEAS—CONTROL OF CONGRESS.**—The voyage of a common carrier, made upon the high seas, even though the ports of departure and destination are within the same state, is under the exclusive control of Congress. It is only the internal commerce and navigation of a state that is under the control and regulation of the state.

**COMMON CARRIERS—DISCRIMINATIONS.**—A complaint in an action against a common carrier to recover for discrimination in freight charges which simply alleges a discrimination and inequality in charges made for the transportation of the same kind of freight for different persons between the same points, without alleging that the freight charged plaintiff is unreasonable and excessive, does not state a common-law cause of action.

**COMMON CARRIERS—COMMON-LAW RIGHT OF DISCRIMINATION.**—At common law, a common carrier is bound to accept and carry goods for all upon being paid a reasonable compensation, but he is under no obligation to treat all customers equally, and he may carry for favored individuals at an unreasonably low rate, or even *gratis*. The fact that he charges less for one than another is only evidence that a particular charge is unreasonable, and the difference between the charges cannot be made the measure of damages in any case, unless it is proved that the smaller charge is the true reasonable charge, and that the higher charge is excessive to that degree.

*L. L. Boone*, for the appellant.

*Luce and McDonald*, for the respondent.

GAROUTTE, J. This is an action brought to recover damages of defendant for a discrimination in freight rates. A demurrer to the complaint was interposed, upon the ground that

the court had no jurisdiction of the subject-matter of the action, and that no cause of action was stated. The demurrer was sustained, and the ruling of the court in this regard is the only matter before us for review.

The complaint substantially alleges that the defendant is a common carrier of freight by vessel between San Francisco and San Diego, via the Pacific Ocean; that between certain dates, plaintiff, as a merchant of San Diego, paid to defendant, according to its regular schedule of rates, large sums of money as charges for freight; that defendant charged a second merchant twelve and one half per cent less for freight of the same character and quantity than it did plaintiff; that said charges were a discrimination against plaintiff; and though often requested so to do, defendant refused to allow plaintiff such reduced rates, whereby he has been damaged in the sum of \$1,674.14. The amount sought to be recovered as damages is the difference between the freight charges made to plaintiff and those made to the more favored merchant.

It would seem to be entirely immaterial, to the extent at least of the consideration of the merits of this appeal, whether the present action is one of contract or of tort. From either standpoint, it arises from a maritime contract solely, and courts of admiralty alone have jurisdiction, unless the cause comes within the reservation found in section 711 of the Revised Statutes of the United States: "The jurisdiction vested in the courts of the United States, in the cases and proceedings hereafter mentioned, shall be exclusive of the courts of the several states: . . . 8. Over all civil cases of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." There can be no question but that the voyage of a carrier made upon the high seas, even though the ports of departure and destination are in the same state, is under the exclusive control and regulation of Congress. It is only the internal commerce and navigation of a state that is under the control and regulation of the state. As was said in *Carpenter v. Schooner Emma Johnson*, 1 Cliff. 638: "Great mischief would inevitably result from any rule denying admiralty jurisdiction in all cases where the place of the departure of the vessel and the place of her destination are both within the same state, when any part of the voyage is upon the high seas; for every navigator knows that in many such cases nearly the whole voyage is out of the limits of any state": See *Lord v.*

*Steamship Co.*, 102 U. S. 544; *Pacific Coast Steamship Co. v. Railroad Commissioners*, 18 Fed. Rep. 10.

It follows from the foregoing authorities that plaintiff has no standing in the courts of this state unless his rights are reserved to him under the reservation of the Revised Statutes, previously quoted. In other words, has he a cause of action at common law against the defendant, under the facts of his complaint? The gist of the complaint is, that for the same quantity and character of freight plaintiff was charged a sum twelve and one half per cent greater for transportation from the same point than the other merchant. Respondent insists that at common law the right of action was based upon the rate charged being unreasonable and excessive in itself, and that a mere discrimination, as disclosed in this case, gave no cause of action; that no wrong was committed if the charge was reasonable for the service, and there being no wrong, no remedy was demanded. Appellant insists that at common law it is the duty of the carrier to "receive and carry goods for all persons alike, and that the rates must not only be reasonable, but equal when the conditions are substantially the same." It will thus be seen that the merits of this appeal will be concluded by a determination as to what is the common law upon this question; and that is a matter of some difficulty of solution, owing to the divergent views expressed upon the subject by the various courts of this country. This divergence of opinion among the courts has undoubtedly been caused to some extent by the fact that for more than fifty years the courts of England have had no occasion to expound the common law upon the subject, common carriers, especially railway companies, having been placed entirely under the control of the statute law. In this country, to some extent, there is a lack of direct authority upon the question, owing to the fact that constitutional and legislative provisions are common in nearly all the states of the Union, prohibiting common carriers from practicing discrimination in their rates of toll. And while these statutory and constitutional provisions have been regarded and incidentally declared to be reiterations of the common law by many courts of this country, sound authority upon which to base such declarations is wanting in the books. The fundamental and statute law of the various states upon the subject appears to have been founded upon the principles embodied in the early acts of Parliament pertaining to the conduct and control of railways as common carriers, rather

than upon the common law of England. Indeed, we have been able to obtain but few direct adjudications from English courts upon the question, owing to the fact that it would seem the business of inland common carriers in that country was not a matter of great concern until railroads were operated; and immediately subsequent to that great epoch in the world's progress, statutory enactments followed, entirely taking away from the courts the necessity of any further application of the common-law rights and remedies. If the common law were as appellant here contends it to be, there would have been no necessity for Parliament to have enacted these stringent "equality clauses," as they are termed. It appears that this principle of equality of charges arose from the necessity of the times, — a necessity created by the operation of railroads, which swallowed up and destroyed all other common carrier systems of England, and thereby created a monopoly of the business, and a power for wrong that at once demanded the restrictions of legislative enactments. This conclusion is fully borne out by the language of Mr. Justice Blackburn in *Great Western R'y Co. v. Sutton*, 4 Eng. & Ir. App. 238, wherein he said: "I think it appears from the preamble of the ninetieth section of the Railways Clauses Consolidation Act, 1845, that the legislature was of opinion that the changed state of things arising from the general use of railways made it expedient to impose an obligation on railway companies acting as carriers beyond what is imposed on a carrier at common law. And if this be borne in mind, I think the construction of the proviso for equality is clear, and is, that the defendant may, subject to the limitations in their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers, as being more than was reasonable. The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact



that another was charged less is only material as evidence for the jury, tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

It is not the purpose of the court to review the authorities of this country upon the question under discussion. For the reasons previously suggested, the matter was only indirectly involved in the great majority of them, and as authority upon the subject, they are weakened to that extent.

The case of *Scofield v. R'y Co*, 43 Ohio St. 571, 54 Am. Rep. 846, is the leading case in the United States supporting appellant's contention, and it is upon this case that he says "he has pinned his faith and hung his hope." The case of *Johnson v. Pensacola and Perdido R. R. Co.*, 16 Fla. 623, 26 Am. Rep. 781, is the leading case in this country holding to the contrary view, and the opinion of the learned judge in the *Scofield* case does not appear to overrule the doctrine there declared, but would seem to look to the statute law of Ohio for support, rather than to the common law. It says, in speaking of the Florida case: "Reliance is placed on the doctrine that discrimination is not necessarily unlawful, and that all the freighter is entitled to is a reasonable rate, not necessarily equal to all; and in the absence of any statute to the contrary, we are not inclined to question the correctness of these decisions."

The facts in the Florida case appear to be practically identical with the facts of this case. Florida had no statutory law upon the subject of the regulation of common carriers, and hence, as here, the merits of the case rested upon the determination as to what was the common law upon the subject. In this case, the ancient as well as the modern authorities are ably reviewed, and the court says: "Our conclusions are, that as against a common or public carrier, every person has the same right; that in all cases where his common duty controls, he cannot refuse A and accommodate B; that all — the entire public — have the right to the same carriage for a reasonable price, and at a reasonable charge for the services per-

formed; that the commonness of the duty to carry for all does not involve a commonness or equality of compensation or charge; that all the shipper can ask of a common carrier is, that for the service performed he shall charge no more than a reasonable sum to him; that whether the carrier charges another more or less than the price charged a particular individual may be a matter of evidence in determining whether a charge is too much or too little for the service performed; and that the difference between the charges cannot be the measure of damages in any case, unless it is established by proof that the smaller charge is the true, reasonable charge, in view of the transportation furnished, and that the higher charge is excessive to that degree." The court also says: "In the last edition of Story on Bailments, we find the rule of the common law thus stated: 'At common law, a common carrier of goods is not under any obligation to treat all customers equally. He is bound to accept and carry for all upon being paid a reasonable compensation. But the fact that he charges less for one than for another is only evidence to show that a particular charge is unreasonable; nothing more. There is nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis.'"

By reason of the variance which exists in the views of the courts of this country as to what is the common law upon this subject, it would seem that the adjudications of the common-law courts of England upon such a matter should have pre-eminent and controlling weight with the courts of the various states.

In the case of *Great Western R. R. Co. v. Sutton*, 4 Eng. & Ir. App. 238, to which reference has already been made, Mr. Justice Blackburn, in a very luminous opinion, addressed, in part, directly to this question, said: "At common law, a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him was to accept and carry all goods delivered to him for carriage according to his profession (unless he had some reasonable excuse for not doing so), on being paid a reasonable compensation for so doing; and if the carrier refused to accept such goods, an action lay against him for so refusing; and if the customer, in order to induce the carrier to perform the duty,

paid, under protest, a larger sum than was reasonable, he might recover back the surplus beyond what the carrier was entitled to receive, in an action for money had and received, as being money extorted from him. But the fact that the carrier charged others less, though it was evidence to show that the charge was unreasonable, was no more than evidence tending that way. There was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even *gratis*. All that the law required was, that he should not charge any more than was reasonable."

The learned justice, in his opinion, clearly indicates that the prime object of the railway equality clauses enacted by Parliament was to cover the exact case of injury by discrimination in freights, such as is claimed by plaintiff in this record.

During the progress of the argument in *Baxendale v. E. C. R'y Co.*, 4 Com. B. 78, Justice Byles said: "I know no common-law reason why a carrier may not charge less than what is reasonable to one person, or even carry him free of all charge."

For the foregoing reasons, the court concludes that the complaint is deficient in not stating that the charge to plaintiff was unreasonable, and that the allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge.

Let the judgment be affirmed.

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A CIVIL MARITIME CASE ARISES ON THE SEA, or from some act or contract pertaining to its commerce or navigation: *Case v. Woolley*, 6 Dana, 17; 32 Am. Dec. 54. When a claim is maritime, it comes within the admiralty jurisdiction exclusively, excepting only the right of suitors to pursue common-law remedies, or what is equivalent thereto in other courts: *Steamer Petrel v. Dumont*, 28 Ohio St. 602; 22 Am. Rep. 397; *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192; 95 Am. Dec. 722. As to the exclusive character of admiralty jurisdiction wherever it attaches, compare *Gindels v. Corrigan*, 129 Ill. 582; 16 Am. St. Rep. 292. As to the concurrent common-law remedy, see *Stats v. Watts*, 7 La. Ann. 440; 26 Am. Dec. 507; *Case v. Woolley*, 6 Dana, 17; 32 Am. Dec. 54; *Thompson v. The J. V. Morton*, 2 Ohio St. 26; 69 Am. Dec. 638.

ADMIRALTY AND MARITIME JURISDICTION extends to all places where the tide ebbs and flows: *Thoms v. Southard*, 2 Dana, 475; 26 Am. Dec. 467. See also the extended note on this subject which follows the case of *Miller v. Mendenhall*, 19 Am. St. Rep. 226-235.

IN THE ABSENCE OF CHARTER OR STATUTORY provisions to the contrary, a common carrier must carry for all who apply, but he may discriminate as to rates, so long as no unreasonable charge is made: *Avinger v. S. C. R'y Co.*, 29

S. C. 265; 13 Am. St. Rep. 716. See also *Root v. Long Island R. R. Co.*, 114 N. Y. 300; 11 Am. St. Rep. 643, and the extended note appended. Notes on the same subject will be found in *Commonwealth v. Power*, 41 Am. Dec. 484-486; *Ex parte Benson*, 44 Am. Rep. 563, 569; *Scotfold v. Railway Co.*, 54 Am. Rep. 862-866.

## HUDEPOHL v. LIBERTY HILL WATER AND MINING COMPANY.

[94 CALIFORNIA, 583.]

**EXECUTIONS — IRREGULARITY IN SALE — PROTECTION TO INNOCENT PURCHASER.** — An innocent vendee of the original purchaser at an execution sale of his redemptioner will be protected against irregularities in the sale of which he had no notice, whether he is proceeded against by action or by motion to set the sale aside.

**EXECUTIONS — SALES EN MASSE — SETTING ASIDE.** — A sale of property *en masse* under execution will not be set aside, unless it is shown that a larger sum would have been realized from the sale if the property had been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the execution.

**EXECUTIONS — SALES EN MASSE — WHEN WILL BE VACATED.** — Sales of property *en masse* under execution are merely voidable and not void, and one who seeks to set such sale aside must show that none of the conditions which would authorize the sale of all the parcels together existed at the time of the sale *en masse*.

**EXECUTIONS — SALES EN MASSE — PAROL WAIVER.** — A judgment debtor may, by parol, waive an execution sale of land in parcels, and authorize its sale *en masse*, and in the absence of a showing that a sale *en masse* was not expressly authorized by the judgment debtor, or that the property was not first offered in parcels and no bids received, the sale will not be set aside.

*Gaylord and Searls, C. A. and P. F. Tuttle, and Sullivan and Sullivan* for the appellant.

*Cross and Hall*, for the respondents.

**PATERSON, J.** This is an action to set aside an execution sale, on the ground that the property, consisting of several disconnected parcels of land, was sold *en masse*.

The court below sustained a demurrer to the complaint, and we think its action was right.

The plaintiff's right to maintain the action rests upon his claim to be a redemptioner by virtue of a judgment rendered in his favor against the defendant corporation in the superior court of San Francisco, of which a transcript of the docket was filed in the county recorder's office in Nevada County, on

March 28, 1887. The property had, however, been sold by the sheriff of Nevada County, October 9, 1886, upon a judgment against the same defendant in favor of one Todd, and the defendant Marshall, who also held a judgment lien against the same property, had redeemed the property from the sale the 13th of October, 1886.

1. The complaint shows that Marshall, the redemptioner who redeemed the property from the purchaser, sold and conveyed all his rights, including the right to a deed from the sheriff to defendant Anna E. Smith, before plaintiff's judgment became a lien on the property, and it is not alleged that she (Smith) had notice of any irregularity in the sale. "Innocent vendees of the original purchaser will always be protected, whether proceeded against by bill or motion": Freeman on Executions, 2d ed., sec. 296; *Mixer v. Sibley*, 53 Ill. 61; *Nelson v. Bronnenburg*, 81 Ind. 199. The doctrine of the Indiana case cited by appellant, *Piel v. Brayer*, has been expressly repudiated in that state: *Jones v. Kokomo Bldg. Ass'n*, 77 Ind. 344.

2. It is not alleged that the proceeds of the sale were less than they would have been if the land had been sold in separate parcels. Unless it is made apparent to the court that a larger sum would have been realized from the sale if the property had been sold in parcels, or that the sale of less than the whole tract would have brought sufficient to satisfy the writ, the sale will not be set aside. The question is, not what would the property bring if sold now or in the future, but whether the proceeds would have been materially increased, or the execution satisfied, by a sale of less than the whole, if the land had been offered and sold in parcels.

3. It is not sufficient to allege merely that several separate tracts were sold in the lump by the sheriff: *Riddell v. Harrell*, 71 Cal. 262. Such sales are voidable, not void; and one who seeks to have a sale *en masse* set aside should show that none of the conditions which would authorize the sale of all the parcels together existed at the time of the sale. There was no lien on the property except that of the judgment creditor at the time of the sale. The sale may have been made *in solido* by express direction of the judgment debtor; or it may have been offered in parcels and no bids received. The judgment debtor may by parol waive a sale of the land in parcels, and give authority to sell in mass: *Smith v. Randall*, 6 Cal. 52;

65 Am. Dec. 475; *San Francisco v. Pixley*, 21 Cal. 59; *Smith v. Meldren*, 107 Pa. St. 348.

The judgment is affirmed.

**EXECUTION SALES — INNOCENT PURCHASER FROM ORIGINAL PURCHASER.** — An innocent purchaser from a fraudulent vendee at an execution sale, collusively made on a judgment which has been paid, there being no irregularity apparent in the judgment or sale, gets a good title: *Fetterman v. Murphy*, 4 Watts, 421; 28 Am. Dec. 729, and note. Mere irregularities in a judicial sale will not necessarily render the sale void as against an innocent purchaser: *Wright v. Dick*, 116 Ind. 538. A title acquired by an innocent purchaser in good faith from a purchaser at a judicial sale is not affected by a reversal of the judgment on a writ of error sued out after the sale: *Macklin v. Allenberg*, 100 Mo. 338; compare *Groff v. Jones*, 6 Wend. 522; 22 Am. Dec. 545.

**EXECUTIONS — SALES EN MASSE.** — The statutory requirements, that lands shall be sold under execution in tracts containing not more than forty acres, are merely directory, and sales *en masse* are not *ipso facto* void: *Rector v. Hartz*, 8 Mo. 448; 41 Am. Dec. 650, and note; *Bunker v. Rand*, 19 Wis. 253; 88 Am. Dec. 684; *Reynolds v. Tenant*, 51 Ark. 84; and where the execution debtor is present or otherwise acquiesces in such a sale, he waives a compliance with the statute: *Wilson v. Trolley*, 3 Hawks, 44; 14 Am. Dec. 509; *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475; *Cornelius v. Burford*, 28 Tex. 203; 91 Am. Dec. 309; *Reynolds v. Tenant*, 51 Ark. 84. A sale under execution of several parcels of land *en masse* is valid, where each parcel has first been offered separately and no bid received therefor: *Lamb v. McConkey*, 76 Iowa, 47. But a sale *en masse*, when the property sold was susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular, and the sale will be set aside: *Smith v. Huntoon*, 134 Ill. 24; 23 Am. St. Rep. 646; *Groff v. Jones*, 6 Wend. 522; 22 Am. Dec. 545; *Reed v. Carter*, 3 Blackf. 376; 26 Am. Dec. 422, and note; *Nesbitt v. Dallam*, 7 Gill & J. 494; 28 Am. Dec. 236. In *Meriwether v. Craig*, 118 Ind. 301, it was decided that where a sheriff sells land as an entirety, without offering it in parcels, in violation of a decree adjudging the land susceptible of division, and ordering a certain part thereof to be first sold, the sale may be set aside.

## DE FRIEZE v. QUINT.

[94 CALIFORNIA, 658.]

**VENDOR AND VENDEE — ESTOPPEL AGAINST GRANTOR.** — A deed of a grantor purporting to convey the absolute title to land estops him from denying that before and at the date of the deed he had such absolute title, and by the deed conveyed it to the grantee.

**VENDOR AND VENDEE — AFTER-ACQUIRED TITLE — TAX DEED.** — A tax title acquired by a grantor subsequently to his making a deed purporting to convey the absolute title inures to the benefit of his grantee.

**TAX DEEDS — OMISSION OF RECITALS.** — A tax deed which fails to contain a recital of the matters recited in the certificate of sale upon which it is based is void.

**TAX DEED RECITING ILLEGAL ASSESSMENT.** — A certificate of tax sale reciting that the property sold was assessed to a party named, "and to all owners and claimants, known and unknown," shows an illegal assessment, and a tax deed based thereon is void, even if it contains all the recitals in the certificate.

**TAX DEED AS PRIMA FACIE EVIDENCE — ILLEGAL ASSESSMENT — OMISSION OF RECITALS.** — A tax deed only raises a presumption that the property was assessed as required by law, and this presumption may be rebutted by the recitals in the certificate of sale showing an illegal assessment, or by proof that the recitals in the certificate of sale are not contained in the deed as required by law.

**ADVERSE POSSESSION — ESSENTIAL ELEMENTS OF.** — In order to constitute title by adverse possession, the occupancy of the land must be sufficiently open and notorious to notify an ordinarily prudent owner of such possession, and of its hostile character, unless he is otherwise actually notified of these facts; and to be available against persons dealing with the owner of the land, the occupancy of the land must be of such character, at least, as should put them upon inquiry as to the title of occupant.

**ADVERSE POSSESSION. — THE BURDEN OF PROVING** all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it.

**ADVERSE POSSESSION — FACTS INSUFFICIENT TO CONSTITUTE.** — Where one claims title by adverse possession to uninclosed and uncultivated land, upon which no one resided, and upon which the cattle of neighboring ranchers roamed and grazed without restraint, the fact that the claimant, through his lessee, erected a rude shed upon the land capable of affording shelter to a few animals, but not used for any purpose, is not sufficient to constitute an adverse possession, in the absence of express notice to the real owner that such occupancy was hostile and adverse.

*W. H. Payson and Hepburn Wilkins*, for the appellant.

*George W. Towle, Jr., and McKoon and Towle*, for the respondent.

**VANCLIEF, C.** Action to quiet plaintiff's alleged title to a tract of swamp and overflowed land, containing ninety-one acres, situate in Marin County. The action was brought against Leander Quint in his lifetime, for whom the administratrix of his estate was substituted before trial. Judgment passed for plaintiff, and defendant appeals therefrom, and also from an order denying her motion for new trial.

The defendant claimed title by a grant, bargain, and sale deed from plaintiff, reciting a paid consideration of \$150, and executed January 18, 1879.

The plaintiff claims title by a tax deed executed to him by the tax collector of Marin County on March 1, 1880, and also by prescription, alleging adverse possession under the tax deed during five years before the commencement of the action.

The recitals in the tax deed show that the taxes for which

the land was sold to plaintiff were state and county taxes assessed to John De Frieze for the fiscal year ending June 30, 1879, amounting to \$1.55, and that the property was sold to plaintiff for this sum, plus costs and charges, altogether amounting to \$2.73.

The title was not traced to any higher source than the plaintiff, though the description of the land in the deed of January 18, 1879, from plaintiff to defendant, closes as follows: "For more particular description, see patent recorded in liber A, page 377, of records of Marin County."

The patent referred to was not put in evidence, but in rebuttal plaintiff's counsel read in evidence the description of the land from the record of that patent, which appeared to be the same as that contained in the deed of plaintiff to the defendant, but did not read enough to show who was the patentee. There is nothing in the record tending to prove that John De Frieze was the patentee, or that he ever owned the land in question, except that the tax for which the land was sold was assessed to him. Finally, it does not appear how or from whom plaintiff originally acquired title to the land before the date of his deed to defendant, yet he is estopped by his deed to defendant, purporting to grant the absolute title, from denying that before and at the date of that deed he had such absolute title, and by that deed conveyed it to the defendant: *Belcher etc. M. Co. v. Deferrari*, 62 Cal. 160; *Dodge v. Walley*, 22 Cal. 228; 83 Am. Dec. 61; *Haffley v. Maier*, 13 Cal. 13; *Clark v. Baker*, 14 Cal. 613; 76 Am. Dec. 449; and it is also clear, that if any title passed by the tax deed, such title would have inured to the benefit of the defendant alone. But it appears that the tax deed was utterly void. The certificate of the tax sale, introduced by plaintiff as a part of his evidence in chief, states that the property was assessed to "John De Frieze, and to all owners and claimants, known and unknown." These words in Italics do not appear in the tax deed, as required by section 3786 of the Political Code, although it appears that they were recited in the deed as drawn, but were stricken out before the deed was executed, thus showing that section 3786 of the Political Code was deliberately disregarded. Counsel for respondent contend that the deed alone can be received as evidence of the assessment, and that the certificate of sale put in evidence by plaintiff as a foundation for the deed must be disregarded. In this I think counsel are mistaken. The deed is only "primary" (*prima facie*)



evidence "that the property was assessed as required by law"; and this rests on the disputable presumption that the matters recited in the certificate are recited in the deed, as required by section 3786 of the Political Code. Here the plaintiff proved by the certificate that the property was not assessed, as required by law, before the deed was offered in evidence. Section 3776 of the Political Code requires the certificate to state "(when known) the name of the person assessed," while the deed is required to recite only the matters recited in the certificate. By first introducing the certificate, the plaintiff proved not only that the property was not lawfully assessed (*Daly v. Ah Goon*, 64 Cal. 512), but also that the deed did not contain the recitals required by law.

Plaintiff's main reliance, however, is upon title by prescription, arising from his alleged adverse possession.

The evidence relied upon to prove adverse possession tended to prove only the following facts: Three years and five months after the execution of the tax deed, to wit, on August 18, 1883, the plaintiff executed to Bernard T. Miller a lease of the land in question for the term of five years, at a rental of twenty-five dollars per year, the lessee covenanting to construct upon the premises, within twenty days from the date of the lease, "a building suitable to afford protection in winter to at least three valuable domestic animals." At the time of the execution of this lease, the land had no improvements upon it, and never had been inclosed, cultivated, nor occupied by any person. The greater portion of it was low, boggy land, but during portions of the year it afforded feed for cattle, which had been accustomed to graze upon it. James Miller, the father of the lessee, had a ranch adjoining the leased premises, on the west side thereof, but which was not fenced on that side. "Cattle could roam at will over this land [land in question] from any contiguous land." James Miller kept a dairy and a number of cows on his ranch. About the time that Bernard T. Miller took the lease from plaintiff, he also leased from his father, James Miller, the latter's dairy and cows, and thereafter allowed these cows, with others of his own, to graze upon the leased land, but without a herder, except to drive the cows from the land for the purpose of milking, and to return them after milking. The cows were not confined to the leased land, but could graze upon other adjoining land; and there was nothing to prevent the cattle of other persons from grazing upon the leased land. Being asked if other cattle than his

own were pastured upon it during the term of the lease, Bernard Miller answered: "They might have been; I cannot say positively. Cattle get back and forth on the ranches once in a while. I could not say positively whether there were or not. . . . I never remembered seeing any cattle on there excepting my own and those I had rented from my father." About a month after the date of the lease, B. F. Miller constructed a shed on the land, sufficient to shelter three cows, by setting a post in the ground at each of the four corners and covering it with boards, and also boarding up three sides of it, but leaving one side open. This was the only improvement placed upon the land by him or plaintiff, and it does not appear whether the shed was ever used by him or not. During the first four years of the lease he resided about a half a mile from the land, but within sight of it, and during the remainder of the term he resided farther from the land. It does not appear that he personally attended to the dairy, but does appear that he was absent from it a considerable portion of the time. In the way above described, he used the land in question during a term of five years before the commencement of this action, but in no other way. It does not appear that his lease was recorded, nor that defendant had actual notice of it, or notice that he used or claimed the land for any purpose during the first four and a half years of the alleged adverse possession. About five months before the alleged five years of adverse possession expired, the defendant erected a house upon the land, twenty feet long by twelve feet wide, in which his employee resided several weeks immediately after it was built, and it was while this house was being built that Miller first notified defendant that he (Miller) had a lease of the land, and claimed the possession of it. Defendant also built a fence on a portion of the line between the land in question and the land of James Miller, immediately after building the house. After the expiration of Miller's lease, and while defendant and his employee were absent from the house, the plaintiff took possession of it, and forcibly prevented them from re-entering. The tax deed to plaintiff was recorded March 1, 1880, and the plaintiff paid the taxes on the land for the years 1881, 1883, 1884, 1885, 1886, 1887, and 1888, said taxes having been assessed to him for those years; but there is no evidence that defendant had actual notice of the deed, or that plaintiff paid the taxes or claimed the land until after defendant built the house on the land. At no time after the execution of the tax

deed was plaintiff in the possession of any part of the land, unless he was so by his tenant, Miller, until he took possession of the house built by defendant, as above stated.

On the facts above stated, counsel for appellant contends, — 1. That the tax deed gave plaintiff no color of title, because he obtained it in bad faith, and for the mere purpose of creating a sham color of title; 2. That even conceding that the tax deed gave color of title, the plaintiff never had adverse possession of the land during any period of time; 3. That conceding adverse possession, it was not continuous during a period of five years, having been interrupted by defendant at the time he built the house and fence on the land, five months before the five years' adverse possession was complete.

As I think the second of these positions should be sustained, the first and third need not be considered.

It is contended for respondent, and the court found, that the acts of plaintiff and his lessee, Miller, constituted adverse possession as defined in section 323 of the Code of Civil Procedure, which is substantially the same as section 11 of the act of 1850, "defining the time for commencing civil actions" (Hittell's Gen. Laws, art. 4353), and which, so far as applicable here, is as follows: "For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, . . . land is deemed to have been possessed and occupied in the following cases: . . . 3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or for pasture, or for the ordinary use of the occupant."

It has been uniformly held in this state, that, in order to set the statute of limitation in motion against the owner of land, the occupancy thereof must be sufficiently open and notorious to notify an ordinarily prudent owner of its existence, and of its hostile character, unless he is otherwise actually notified of these facts; and to be available against persons dealing with the owner for the land, the occupancy must be of such a character, at least, as should put them upon inquiry as to the title of the occupant: *Thompson v. Pioche*, 44 Cal. 508; *Thompson v. Felton*, 54 Cal. 547; *Fair v. Stevenot*, 29 Cal. 488; *Smith v. Yule*, 31 Cal. 182; 89 Am. Dec. 167; *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100; *Thomas v. England*, 71 Cal. 457; and the burden of proving all the essential elements of an adverse possession, including its hostile character, is upon

the party relying upon it: *American Co. v. Bradford*, 27 Cal. 361; *Lick v. Diaz*, 30 Cal. 75; *Garwood v. Hastings*, 38 Cal. 223.

The evidence furnishes no ground for a pretense, even, that defendant ever had actual or express notice that the plaintiff or his lessee had or claimed any kind of possession until about the time that defendant built his house upon the land, which was not more than six months before the alleged period of five years' adverse possession expired.

Conceding that what is proven to have been done on the land by plaintiff and his lessee, Miller, constituted any kind of possession, which may be regarded as doubtful, such possession was not of such a character as to justify the inference that defendant had notice of its existence even, much less that it was hostile to his title, until four years and six months of the alleged period of adverse possession had elapsed. The land was uninclosed and uncultivated. No person resided upon it. It was bounded on all sides by uninclosed land, upon which, as well as upon it, the cattle of the neighboring ranchers roamed and grazed without restraint. Defendant had no notice of the lease to Miller, nor that Miller had leased his father's dairy or cows, or controlled any cattle that grazed upon the land except his own. The grazing of his neighbor's cattle upon the land, so long as defendant made no effort to restrain them, by inclosure or otherwise, did not indicate to him that his neighbors had or claimed adverse possession of his land. The little shed sufficient to afford shelter to "three valuable domestic animals," say ten feet square and seven feet high, is the only thing relied upon to indicate to defendant that plaintiff or Miller was in possession of the land; and no doubt it was intended to be used as evidence of such possession, and for no other purpose. So important was it considered by the plaintiff, that the only visit he made to the land during the term of the lease was for the purpose of ascertaining whether Miller had built it according to the covenant in the lease. Why was this shed required to be sufficient to shelter only three valuable animals? Why is there no evidence that it was ever used for any purpose? It was obviously a mere sham, which should be allowed no effect whatever as evidence of possession.

I think the finding of adverse possession of the land in question is not justified by the evidence, and that the judgment and order should be reversed and a new trial granted.

BELCHER, C., and TEMPLE, C., concurred.

The COURT. For the reason given in the foregoing opinion, the judgment and order are reversed and a new trial granted.

#### Adverse Possession.\*

*Notoriety Essential to.* — To constitute an adverse possession such as will bar the title of the legal owner by lapse of time, it must not only be actual, but also visible, continuous, notorious, distinct, and hostile, and of such a character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant. This rule is so well settled as to scarcely need the citation of authority to support it: *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71; *Denham v. Holman*, 26 Ga. 182; 71 Am. Dec. 198; *Worcester v. Lord*, 56 Me. 265; 96 Am. Dec. 456.

The element of notorious hostility to the title of the true owner is an indispensable ingredient of adverse possession. This notorious, hostile possession cannot be inferred except from proof of an express or implied denial of the owner's title, accompanied with such acts or declarations on the part of the holder as are sufficient to put the true owner on notice that the land is claimed and held in hostility to his rights: *Ringo v. Woodruff*, 43 Ark. 469; *Haffendorfer v. Gault*, 84 Ky. 124; *McDonald v. Fox*, 20 Nev. 364; *Hicklin v. McClellan*, 18 Or. 126; *Evans v. Templeton*, 69 Tex. 375; 5 Am. St. Rep. 71; *Chicago etc. Ry. Co. v. Galt*, 133 Ill. 657; *Mauldin v. Cox*, 67 Cal. 387; *Thompson v. Pioche*, 44 Cal. 503; *Shaw v. Schoonover*, 130 Ill. 443; *Denham v. Holman*, 26 Ga. 182; 71 Am. Dec. 198; *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100; *Sparrow v. Hovey*, 44 Mich. 63; *Russell v. Davis*, 38 Conn. 562; *Grant v. Fowler*, 39 N. H. 101; *Yelverton v. Steele*, 40 Mich. 538; *Satterwhite v. Rosser*, 61 Tex. 166; *Bracken v. Jones*, 63 Tex. 184; *Creekmar v. Creekmar*, 75 Va. 430. "Notoriety of the adverse claim under which possession is held is a necessary constituent of title by adverse possession, and therefore the occupation or possession must be of that nature that the real owner is presumed to have known that there was a possession adverse to his title, under which it was intended to make title against him. A party relying on title from such a source must prove possession in himself or in those under whom he claims, of such a character as is calculated to inform the true owner of the nature and purpose of the possession to which the lands are subjected"; *Foulke v. Bond*, 41 N. J. L. 527, 545.

*The Claim of Title*, which is an indispensable element of adverse possession, has in it nothing of stealthiness, nor is it elastic or flexible. There must be publicity, continuity, and good faith in its assertion, leaving no room for doubt by the person against whom it is asserted that his title is disputed, and a hostile title asserted: *Potts v. Coleman*, 67 Ala. 221; *Worcester v. Lord*, 56 Me. 265; 96 Am. Dec. 456; *Denham v. Holman*, 26 Ga. 182; 71 Am. Dec. 198.

The possession under which prescription is founded must be public and unequivocal, and the evidence must establish that the possessor claimed the

#### \* REFERENCE TO MONOGRAPHIC NOTES.

Adverse possession of part when treated as of whole: 12 Am. Dec. 357-359.

Adverse possession, mistake, and ignorance as to boundary lines, whether affects question of: 24 Am. St. Rep. 388-391.

Adverse possession of highways, streets, and public parks, prescriptive title when acquired by: 14 Am. St. Rep. 278-282.

property as his, and exercised some rights as an owner: *Simon v. Richard*, 43 La. Ann. 842. No particular act or series of acts are necessary to be done on the land, in order that the possession may be notorious, but any visible acts which clearly demonstrate an intention to claim ownership and possession will be sufficient to establish the claim of adverse possession: *Ellicott v. Pearl*, 10 Pet. 412; *Evings v. Burnet*, 11 Pet. 41; *Ford v. Wilson*, 35 Miss. 490; 72 Am. Dec. 137; *Royal v. Lisle*, 15 Ga. 545; 60 Am. Dec. 712; *Langworthy v. Myers*, 4 Iowa, 18; *Bates v. Norcross*, 14 Pick. 224. Such claim of title may be made out by visible acts, without any assertions by word of mouth: *Barnes v. Light*, 116 N. Y. 34.

A *Clandestine Use* of the premises, so secret in character that the owner is not likely to know of it, will not constitute a disseisin. On the other hand, as before shown, the occupation must be so open and public that the owner may be presumed to have notice of it and of its extent: *Denham v. Holman*, 26 Ga. 182; 71 Am. Dec. 193; *Cook v. Babcock*, 11 Cush. 206; *Lucas v. Daniels*, 34 Ala. 183.

*Acts Equivalent to Notice.*—Some acts are so notorious in their character that they of themselves constitute notice to the owner of the adverse claim, and are sufficient evidence that the holding is adverse. Such are the maintenance of fences and other substantial inclosures: *Takasferro v. Butler*, 77 Tex. 578; *Tourtelotte v. Pearce*, 27 Neb. 57; *Barnes v. Light*, 116 N. Y. 34; *Russell v. Davis*, 38 Conn. 562; *Outter v. Cambridge*, 6 Allen, 20; or the erection of buildings on the land; *Poignard v. Smith*, 6 Pick. 172; *Erwin v. Olmstead*, 7 Cow. 229. The inclosure of the land must be substantial, to give notice of and constitute an adverse possession. Mere surveying a line around land, lopping trees to indicate the line, or building a brush fence insufficient to turn stock, will not be sufficient: *Hutton v. Schumaker*, 21 Cal. 453; *Borel v. Rollins*, 30 Cal. 409; *Kennebeck Purchase v. Springer*, 4 Mass. 416; 3 Am. Dec. 227; *O'Hara v. Richardson*, 46 Pa. St. 235; *Jackson v. Schoonmaker*, 2 Johns. 230.

There are many cases, however, where even an inclosure is not necessary to an adverse claim. Notice may then be presumed from other acts of notoriety, indicating an intent to claim ownership. These cases occur where the property is of such character, and is so circumstanced, that there can be neither actual permanent occupation nor improvement. The disseisin may then be evidenced by any act of public dominion which is possible with property of that kind: *Langworthy v. Myers*, 4 Iowa, 18; *Ford v. Wilson*, 35 Miss. 490; 72 Am. Dec. 137; *Evings v. Burnet*, 11 Pet. 41; *Ellicott v. Pearl*, 10 Pet. 412; *Cooper v. Morris*, 48 N. J. L. 607; *Draper v. Shoot*, 95 Mo. 203.

To constitute adverse possession, the use made of the land must be suited to its nature, adaptability, and locality; all that the law requires is, that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such character as may reasonably be expected to inform the true owner of the fact of possession and claim of adverse title: *Woods v. Monterall et al.*, 84 Ala. 560; 5 Am. St. Rep. 393; *Bell v. Denson*, 56 Ala. 444. In such case an adverse user is such use of the property as the owner himself would make, asking no permission, and disregarding all other claims to it, so far as they conflict with this use: *Blanchard v. Moulton*, 63 Me. 434.

The rule as to the notoriety of the acts necessary to evidence an adverse holding is well stated in *Murphy v. Doyle*, 37 Minn. 113-115, where it was said: "As to what will constitute adverse possession, such as will work a disseisin of the true owner, is a subject which has afforded a wide field for judicial discussion and decision. All the authorities agree that the posses-

sion must be actual, visible, and exclusive; but as to what will constitute such a possession, or as to what shall be deemed the extent of it under a given state of facts, there has been some diversity of view. The doctrine of the supreme court of the United States is, that to constitute adverse possession there need not be a fence or a building; that it is sufficient if visible and notorious acts of ownership have been exercised over the premises for the time limited by statute: *Ewing v. Burnet*, 11 Pet. 41, 53. It is difficult to lay down a precise rule applicable to all cases, as much must depend upon the nature and situation of the property, and the uses to which it can be applied. For example, in the case of a farm, if the possession is open and notorious, comporting with the ordinary management of farms, it is not necessary that the whole farm be either improved or inclosed, at least where the unimproved part, as woodland, is subservient to and connected with that which is improved; and for the same reason, the rule requiring actual and visible occupancy will be more strictly construed in an old and populous country, where land is usually improved and inclosed, than in a new country recently settled, in which the land is only partially improved. Again, where the occupant enters under color of title through some deed or written instrument purporting to be a conveyance, he stands in a different position from a mere naked disseisor. He is presumed to have intended his entry to be co-extensive with the description contained in his deed, although the actual improvements are only on a part of the tract. The general doctrine of the courts in the United States is, that where the occupant, or those under whom he claims, enters into possession under claim of title, founding such claim upon some written instrument as being a conveyance of the premises in question, and there has been continued occupation of some part of the land included in the conveyance, he or they will be deemed to have been in the adverse possession of the whole of such premises, if not in the adverse possession of any one else."

*Acts of Sufficient Notoriety.* — Under the above rule, where a person claiming uninclosed land exercises acts of ownership over it, by the continued use of it for the purposes to which it is adapted, his possession will be regarded as actual and adverse, as where the land is uninclosed timber-land and the claimant cuts wood and timber for ordinary purposes during the period of his ownership: *Clement v. Perry*, 34 Iowa, 564; *Brett v. Farr*, 66 Iowa, 684; or cuts timber and hay from the land: *Forey v. Bigelow*, 56 Iowa, 381. A claimant of out-lots which he does not fence or cultivate may establish an adverse possession by cutting grass and timber, ditching, paying taxes, and openly claiming and using the land: *Curtis v. Campbell*, 54 Mich. 340. When the land is uninclosed and susceptible of cultivation, the cultivation of the land each year by the adverse claimant is sufficiently notorious to be notice to the true owner of the adverse claim: *Hughes v. Anderson*, 79 Ala. 209; *Beecher v. Galvin*, 71 Mich. 391; *Richards v. Smith*, 67 Tex. 610. The possession of an uncultivated piece of grazing land, and the pasturing stock upon it, under the care of herders, during the pasturing season of the year, though it is left unoccupied during the rest of the year, is sufficient to establish adverse possession: *Webber v. Clarke*, 74 Cal. 11. One who habitually uses the land for the pasturage of stock, confining his stock thereon, and excluding all others therefrom, the land being adapted to that purpose, is as much in the notorious possession of it as though he had it inclosed by a fence: *Sheldon v. Mull*, 67 Cal. 299-301; *Wilson v. Atkinson*, 77 Cal. 485, 486; 11 Am. St. Rep. 299. Long-continued acts of ownership, by cutting, thatching, and leasing the right to cut to others, exercised by the adverse claimant, is sufficient to establish

adverse possession of land covered by water: *Ros v. Strong*, 119 N. Y. 316. Of course, fencing the land, and a continued use of it as a pasture without residing on it, is sufficient evidence of an adverse claim: *Castagnol v. Von Lupin*, 58 Tex. 570; and if the fences, together with natural barriers, turn stock, this is sufficient for the purpose of a notorious possession: *Goodwin v. McDade*, 75 Cal. 584. The continued use of a strip of land by a mill company as its road-bed, and the payment of taxes thereon without inclosing it, will constitute adverse possession: *Daniels v. Gualala Mill Co.*, 77 Cal. 300. The inclosure of a public road or street, renting it, or any other act indicating a notorious claim of ownership, will create a title by adverse possession if continued for the statutory period; *Sadtler v. Peabody Heights Co.*, 66 Md. 1. The contrary doctrine is maintained in *Brooks v. Riding*, 46 Ind. 15; and see note on this subject, *Orr v. O'Brien*, 14 Am. St. Rep. 278-281. The payment of taxes on land, together with other acts indicating a claim of and assertion of ownership adverse to the true owner, is sufficient to sustain a claim by adverse possession: *Omaha etc. Co. v. Barrett*, 81 Neb. 803; *Brown v. Clark*, 89 Cal. 196.

*Acts not Sufficiently Notorious.* — On the other hand, it is well settled that the mere payment of taxes on land, unaccompanied with other acts indicating an adverse claim, is not of sufficient notoriety to put the true owner on notice, or to constitute adverse possession: *Raymond v. Morrison*, 59 Iowa, 371; *Bear Valley Coal Co. v. Dewart*, 95 Pa. St. 72; *Malloy v. Bruden*, 86 N. C. 251; *Bradstreet v. Kinsella*, 76 Mo. 63; *Miller v. Long Island R. R. Co.*, 71 N. Y. 380. The payment of taxes on the land, with only an occasional act of ownership, is not evidence of an adverse holding sufficient to constitute a disseisin against the true owner: *Wells v. Austin*, 59 Vt. 157; *Scott v. Mills*, 49 Ark. 266; *Brown v. Rose*, 48 Iowa, 231. This is especially the case when the land is susceptible of a more strict and definite possession: *Cook v. Farrah*, 105 Mo. 492; *Draper v. Shoot*, 25 Mo. 203. Occasional entries upon land and the exercise of occasional acts of ownership, no matter how clearly they may indicate a purpose to claim title and exercise dominion over the land, do not constitute a notorious possession adequate to support a claim of title by prescription: *Ruffin v. Overby*, 105 N. C. 78; *Aiken v. Eln*, 62 N. H. 400; *Miller v. Long Island R. R. Co.*, 71 N. Y. 380; *Cox v. Ward*, 107 N. C. 507; *Richmond Iron Works v. Wadhams*, 142 Mass. 569; *Chicago etc. R'y Co. v. Galt*, 133 Ill. 657; *Foulke v. Bond*, 41 N. J. L. 527. Different entries at different times, by different persons, between whom there is no privity, no connected claim of rightful holding, is but a succession of trespasses, and will not support a claim of adverse possession: *Ross v. Goodwin*, 88 Ala. 390. As was said in *Olewine v. Messmore*, 128 Pa. St. 470, although "adverse possession of land may be said to be founded in trespass, it must be a trespass constantly continued by acts on the premises. It must challenge the right to all the world; the claimant must keep his flag flying, and present a hostile front to all adverse pretensions." It follows, as was decided in the above case, that the acts of cutting firewood, making rails, or even making a clearing upon uninclosed land at different times, without following this up with inclosure, residence, or cultivation, will give no title by adverse possession. Occasional fugitive acts of occupancy on wild timber-land, such as cutting timber thereon to repair a dam on another tract, mowing an acre or two of marsh grass, or allowing cattle to graze thereon, will not constitute an adverse possession: *St. Croix etc. Co. v. Ritchie*, 78 Wis. 492. The same rule applies to occasional entries of all kinds; as for the purpose of making brick: *Williams v. Wallace*, 78 N. C. 354; or gathering grass or sand: *Price v. Brown*,



101 N. Y. 669; or digging sand on the land and selling it: *Parker v. Wallis*, 60 Md. 15; 45 Am. Rep. 703. An annual or occasional entry for a short time for the purpose of cutting natural grass will not work a disseizin of the true owner: *Basille v. Murray*, 40 Minn. 48; *Roberts v. Baumgarten*, 110 N. Y. 380. An occasional use of land in the customary way, for the particular purpose to which it is best suited, will not amount to an ouster of the real owner: *Trustees of East Hampton v. Kirk*, 68 N. Y. 459. When the land is half prairie and half timber, and might easily be inclosed and is fit for cultivation, the erection of temporary structures, pasturing of hogs, or cutting timber at different times under a claim of ownership, does not constitute an adverse holding: *Coot v. Farrah*, 105 Mo. 492. Such possession of land is merely subsidiary and incidental to a trespass, and if abandoned when that object is accomplished, although it may have been continued for some weeks or months, is not of sufficient notoriety to convey notice to the real owner or constitute an adverse possession: *Austin v. Hall*, 32 Wis. 478. The mere placing of rails on land, no further act being shown toward exclusive possession, will not constitute an adverse holding: *Richards v. Smith*, 67 Tex. 610. Breaking uninclosed land, sowing it to wheat, and harvesting the crop at intervals of fifteen years, without other acts of possession, is not evidence of an adverse holding: *Robbins v. Moore*, 129 Ill. 30. The occupant of a block of city land, on which he resides, cannot extend his occupancy and adverse possession to an unoccupied and unimproved lot adjoining, by paying taxes thereon and keeping trespassers off. In such case, "there must be an actual possession of the premises, the exercise of some visible notorious act, such as inclosing, cultivating, or otherwise improving the land," to constitute an adverse holding: *Wilson v. McQueen*, 7 Or. 87-107. This rule applies in all cases where a naked possession alone is relied upon as constituting title to land. In all such cases there must be an actual, notorious occupancy, and the possession of the adverse claimant cannot be extended by construction beyond such occupancy: *Bracken v. Jones*, 63 Tex. 184; *Foster v. Lutz*, 86 Ill. 412; *Bristol v. County of Carroll*, 95 Ill. 84; *Kimball v. Sterner*, 65 Cal. 116.

**CASES**  
IN THE  
**SUPREME COURT OF JUDICATURE**  
OF  
**INDIANA.**

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**STATE v. CARR.**

[129 INDIANA, 44.]

**PUBLIC OFFICERS. — SALARY IS AN INCIDENT OF OFFICE, AND BELONGS TO THE PERSON HOLDING THE LEGAL TITLE** to the office, and he can sue for and recover it when he is a state officer occupying apartments assigned to him and discharging the duties of the office, although another person, claiming to be in possession of the office and to exercise its functions, has received from the proper officers of the state payment of the salary due to the officer *de jure*.

**PUBLIC OFFICERS. — THE SALARY OF AN OFFICER DE JURE CANNOT BE WITHHELD FROM HIM** because, in the statute making the appropriation of moneys for the salary and expenses of the office, another person is named as the incumbent entitled to the salary. The statute will be construed as intending that the salary be paid to the officer entitled to the office, though it names as such officer a person not so entitled.

**CONSTITUTIONAL LAW — ASSUMPTION BY LEGISLATURE OF JUDICIAL FUNCTIONS. —** A statute making an appropriation to pay the salary of an office, and designating a person as entitled to such salary, is, so far as it attempts to determine who is entitled to the office and salary, an assumption by the legislature of judicial powers, and to that extent void.

**CONSTITUTIONAL LAW — OFFICE, LEGISLATURE CANNOT DETERMINE RIGHT TO SALARY OF. —** It is not within the province of the legislature to declare, in an appropriation bill, who are or who are not the legally elected officers of any department, and a statute so declaring, and making it a felony for the auditor of the state to draw his warrant in payment of salary, except to the persons named as officers in the statute, is unconstitutional, and will not be permitted to deprive the officer *de jure* of his salary, though another person is named in the statute as entitled thereto, and payment of a portion of the salary has been made to him.

**PUBLIC OFFICERS. — A DE FACTO OFFICER HAS NO RIGHT TO THE EMOLUMENTS OF THE OFFICE,** the duties of which he performs under color of an appointment, but without legal title, and hence cannot maintain an action for the salary.

**MANDAMUS WILL ISSUE TO COMPEL THE AUDITOR OF STATE TO DRAW HIS WARRANT IN PAYMENT OF THE SALARY OF AN OFFICER DE JURE who was in possession of the office, although another person was named in the appropriation bill as being in possession of the office and entitled to the salary, and such bill purported to make it a felony to draw such warrant in favor of any one except the person therein named, and a portion of the salary was, in fact, paid to the person so named, while he was also claiming to discharge the duties of the same office, his title thereto being founded upon an unconstitutional statute.**

***A. J. Beveridge, L. T. Michener, A. C. Harris, J. H. Gillett, F. H. Blackledge, L. M. Campbell, and E. G. Hogate, for the appellant.***

***A. G. Smith, attorney-general, L. O. Bailey, and P. Daniels, for the appellee.***

OLDS, J. The relator filed his petition in this case, asking that a writ of mandate issue against the appellee, the auditor of state, compelling him to draw his warrant on the treasurer of state in favor of the relator for the sum of two thousand five hundred dollars, the amount alleged to be due the relator as his salary as chief of the Indiana bureau of statistics.

Issues were joined on the complaint and a trial had. There were demurrers filed to the paragraphs of answer, and overruled, and exceptions reserved. Errors are assigned on these rulings. On proper request there was a special finding of facts and conclusions of law stated by the court. The conclusions of law were excepted to by the appellant, and a proper assignment of error made thereon.

The questions presented and discussed relate to the right of the relator to the salary alleged to be due him, and his right to have a writ of mandate issue compelling the auditor of state, the appellee, to draw his warrant on the treasurer of state in favor of the relator for the sum due him. No question is presented and discussed as to the regularity of the proceedings, or as to the proper parties being before the court.

The facts found by the court show that on the thirty-first day of May, 1889, the relator, John Worrell, was appointed and commissioned chief of the Indiana bureau of statistics, by Alvin P. Hovey, governor of the state of Indiana; that at the time of his appointment he was a resident voter of the state, of legal age, and in every way eligible to hold the office, and on the day of his appointment he took the oath of office, which was indorsed on the back of his commission, and filed a copy thereof in the office of the secretary of state, and in every way

qualified as such officer, and on the same day appellee was notified of the relator's appointment and qualification; that after the relator's appointment, he applied for office room in the state capitol, to be occupied by him as the chief of the Indiana bureau of statistics, and was assigned a room for that purpose by the auditor of state, which room was independent and removed from a room occupied by William A. Peelle, Jr., and said relator, Worrell, has been doing work and performing the duties of the chief of the bureau of statistics, independent of work performed by said Peelle, from May 31, 1889, to November 19, 1890.

At the time relator Worrell was appointed, commissioned, and qualified as chief of the Indiana bureau of statistics, said office was held and occupied, and the duties thereof were being performed, by one William A. Peelle, Jr., a person who was eligible to fill the office, who held said office under and by virtue of an election thereto by the fifty-third, fifty-fourth, and fifty-sixth general assemblies of the state of Indiana, and was commissioned under said first two elections by governors Porter and Gray, which commissions set out the elections and certified thereto; that Governor Hovey refused to issue to said Peelle a commission under the election of said Peelle to said office by the fifty-sixth general assembly; that Peelle claimed and had no other title to said office, except as hereinabove found, said office being vacant except as so occupied and claimed by Peelle and Worrell.

The findings further show that Worrell demanded of Peelle possession of the office immediately after his appointment and qualification, and Peelle refused to surrender it, and that Worrell immediately commenced *quo warranto* proceedings against Peelle for the possession of the office, which were twice appealed to the supreme court and reversed, and were not disposed of until after the state election in 1890, at which election Peelle was duly elected to said office, and was commissioned by the governor, and qualified as such officer, and on Peelle's motion, supported by proof of his election, the *quo warranto* proceedings were dismissed; that during all the time Peelle continued to occupy the apartments as he had previous to Worrell's appointment, and retained the archives of the office, collected information and made records the same as he had done prior to Worrell's appointment; that the salary of the chief of the bureau of statistics is \$1,800 per year, and there is money in the treasury of the state of Indiana

subject to be paid out on warrants of the auditor of state for the payment of the salary of said chief; that relator has, prior to the commencement of this suit, demanded of the appellee that he draw a warrant in relator's favor for this salary, and since November 4, 1890, he has made demand upon the appellee that he draw such warrant for the sum of \$2,550, said sum to be paid to him as salary from May 31, 1889, to November 1, 1890, and presented itemized and qualified bills therefor, as required by law, and appellee has refused to draw such warrant; that on October 31, 1889, appellee drew his warrant on the treasurer of state in favor of William A. Peelle, Jr., demand having been made by said Peelle for the sum of \$750 as salary, or by way of compensation as chief of the Indiana bureau of statistics, from May 31, 1889, to November 1, 1889; otherwise said appellee has not drawn his warrant on the treasurer of state in favor of any person for the salary of said office.

There is a further finding in regard to the provision of the laws appropriating the amount of the salary of such office, and a provision that it should be paid to Peelle as such chief.

On the foregoing facts, the court stated, as a conclusion of law, that relator was not entitled to a writ of mandate, as prayed in his petition.

The act of the legislature, approved March 29, 1879, creating a state bureau of statistics, made it the duty of the bureau to collect, systematize, tabulate, and present in biennial reports, statistical information and details relating to agriculture, manufacturing, mining, commerce, education, labor, social and sanitary condition, vital statistics, marriages and deaths, and the permanent property of the productive industry of the people of the state. The first section of this act provides that the department is established for the collection and dissemination of information hereinafter provided, by biennial printed reports to the governor and legislature of the state, and it provides for the appointment of the chief by the governor. (Acts of 1879, p. 193.)

Some amendments have been made to this act. By an act passed in 1883 (Elliott's Supp., sec. 1852), an attempt was made to change the method of selecting the chief, and provide for his election by the general assembly; and by an act in 1889 (Elliott's Supp., secs. 1854-1862), some additional duties were added, and it was made the duty of the chief to transmit one copy of the biennial report to each county and

state officer. The duty of the bureau is to gather such information as is required by the law, systematize it, and publish it in proper printed reports, and to disseminate such information by printed reports of all such information collected, and distributing them to the governor of the state, the general assembly, and to each state and county officer of the state. There is no law providing that any public records shall be kept of such information, save the printed reports. The benefits to be derived on account of such a bureau is through the publication and distribution of the biennial reports. It is provided that headquarters for the bureau shall be furnished by the state.

The findings of fact show that the relator, Worrell, had been assigned and provided office-rooms by the auditor of state in the state-house. There was nothing to prevent him from discharging the duties of the office, collecting and systematizing the information contemplated by the law, and publishing the same in printed reports, and distributing them with the same efficiency and to the same extent as if Peelle had surrendered the apartments occupied by him previous to that time; and the findings of fact show that Worrell did discharge the duties of the office in compliance with the law. It is true, there is a finding that Peelle was in possession of the archives and records of the office. What the archives and records were that he was in possession of the findings do not show. The law makes no provision whereby such officer is required to keep any public records, or anything else to be kept in connection with and belonging to the office, there to remain as the property of the state, which the outgoing officer would be required to turn over to his successor. The findings of fact show that Worrell was eligible to the office; that he was duly appointed, commissioned, and qualified as such officer; that the appellee, the auditor of state, had notice at the time of his appointment and qualification; that he made application to the auditor of state for apartments, and the auditor of state assigned him apartments for headquarters of the bureau; and that he occupied them, and discharged the duties of the office. It is further found that Peelle retained the apartments formerly occupied by him, and continued to act, or assumed to act, as chief, and collect information the same as he had done before; but the findings show that he had no title to such office, except through a pretended election by the general assembly. In the adjudication in the *quo warranto* proceedings, the main

question in this case was settled by the decisions of this court on appeal: *State v. Peelle*, 121 Ind. 495, and *State v. Peelle*, 124 Ind. 515.

By these decisions, between these same parties, the law settled that the statute authorizing the election of a chief of the bureau of statistics by the general assembly was unconstitutional and void, and that the election and commission of Peelle gave to him no title to the office, and that the governor was authorized to appoint to fill the vacancy until the office was filled by an election. Under these decisions, the facts found in this case show that Worrell was, during the time from his appointment and qualification up to the date of the election and qualification of Peelle as his successor, the *de jure* officer; not only the *de jure* officer, but in possession of, and discharging the duties of, the office. When he was appointed by the governor, and qualified, he became the *de jure* officer; and when he was assigned quarters by the auditor of state in the state capitol to occupy as headquarters for the bureau, and discharge the duties of the office, he was equipped in full to discharge all the duties incident to the office, and he did discharge the duties from thenceforward until his successor was elected and qualified. Being a *de jure* officer, and in possession of, and discharging the duties of, the office, under all the authorities he is entitled to the salary. Indeed, the later and better reasoned cases, hold that the salary is an incident to the office, and belongs by law to the person holding the legal title to the office, and that he can sue and recover it regardless of the fact whether he is occupying and discharging the duties of the office or not, if he be willing to do so, but is kept out by another who is claiming to act as an officer *de facto*.

This would seem to be the true theory, though it is not necessary to go to that extent in this case, as, under the facts found, Worrell was not only the *de jure* officer, but was, in fact, in possession and discharging the duties of the office during the time for which he claims salary. It is true, the state and the public are interested in having a public office filled; and when one holds an office, though without title, and acts as an officer *de facto*, and keeps out the *de jure* officer, and while so in possession discharges the duties of the office, the public good demands that the acts of such *de facto* officer, in so far as they affect third parties or the public, be declared valid; but there is no valid reason for declaring that as between the

*de jure* and *de facto* officer, the *de facto* officer is entitled to the salary, or that he, by excluding the *de jure* officer, can prevent him from receiving the salary, or for holding that when one charged with the duty of paying the salary, when with knowledge of all the facts he pays to the *de facto* officer, he shall be relieved from paying to the *de jure* officer. The disbursing officer cannot be sued or compelled to pay a *de facto* officer. When the *de facto* officer sues for his salary, he brings in question the title to the office, and he cannot recover without establishing his legal right and title to the office. To hold that payment by a distributing officer to a *de facto* officer exonerates him from liability to the *de jure* officer for the salary but stimulates irresponsible persons to cling to an office without even a shadow of title, and exclude the lawful occupant with a view of recovering the salary of the lawful occupant to the office; but under the facts in this case we are not required to go to the extent of holding that the *de jure* officer out of possession can recover his salary notwithstanding another is occupying and discharging the duties of the office as an officer *de facto*; for in this case the facts found show Worrell to have been an officer *de jure*, in possession of the apartments assigned to him by the proper officer, the auditor of state, and discharging the duties of the office, so that the headquarters of the bureau of statistics of the state of Indiana were, both in law and in fact, in the apartments in the capitol building set apart for occupancy by Worrell, the legally appointed, commissioned, and qualified chief of the bureau of statistics; and as it seems to us, it would be a travesty on justice to hold that Worrell, under such a state of facts, could be prevented from recovering his salary, or that the auditor of state could refuse to draw a warrant, or the treasurer of state refuse to pay a warrant, for his salary, notwithstanding Worrell is the lawful officer in possession; but on account of Peelle continuing to occupy rooms theretofore occupied by him, and to gather statistics, after it has been held by the supreme court of the state that the law under which Peelle claims to have been elected is unconstitutional and void, and the commissions issued in pursuance of such election gave him no title to the office. Indeed, the facts found show that Peelle terminated the *quo warranto* proceedings by abandoning any claim to the office by virtue of his position and the election by the general assembly, and set up his title to the office by virtue of his election by the people, and his commission and qualification, dismiss



ing the case upon the grounds that after his election and qualification he was the legal chief of statistics, and no judgment or ouster could be rendered against him. The appellee had full knowledge of Worrell's appointment and qualification; he assigned him apartments to occupy as such officer; he knew that he was in possession of the office, as he had assigned him the apartments in the state capitol which he occupied. Worrell is entitled to recover the full amount of his salary, and to have a warrant drawn on the treasury by the auditor of state for the amount, unless the provision of the law naming Peelle as the chief, to whom the salary is to be paid, prohibits the payment to the legal officer, and this we will now consider.

As we have seen, Peelle was not the legal officer, and Worrell was the legal officer, in possession of the office, discharging the duties of the office. The proposition contended for is, that notwithstanding Worrell was the legally appointed and qualified officer, discharging the duties of the office for which a salary is fixed, and to which the legally qualified officer is entitled as an incident to the office, the legislature can make an appropriation to pay the salary which Worrell has earned, and to which he is entitled, and without any legal authority to do so, name Peelle as such officer, chief of the bureau of statistics, and appropriate an amount to pay the salary of the chief, and provide it should be paid to Peelle, and none other; and such a clause in a law would be valid, providing for the payment to Peelle of the salary earned by and due to Worrell. The statement of the proposition carries with it the fallacy of it. That such a provision is invalid seems too clear to admit of discussion. It is directly appropriating a salary due to one, and which is the property of one, for the benefit of another.

By an act of the general assembly, approved March 11, 1889, there is appropriated "for all of the expenses of the bureau of statistics, authorized by law, including the salary of the chief of said bureau, of all assistants, all traveling and office expenses, including all blanks, stationery and postage, to be paid out on the itemized and qualified bills of the chief of the bureau of statistics, eleven thousand dollars; for the year ending October 31, 1889, the sum of four thousand dollars." Stopping with this provision of the law, no complications could arise. It expressly provides that the several sums shall be paid out "on the itemized and qualified bills of the chief."

But there follows, in a separate clause of the act, a provision in the law providing that "the several sums so appropriated by this act for said bureau of statistics shall be paid to William A. Peelle, Jr., chief of said bureau, elected by this general assembly, or to his successors in office appointed pursuant to an act of the general assembly, in case of the death, removal from the state, or resignation of said William A. Peelle, Jr., and to no other person or persons." It is evident that this provision was inserted in the law, not with a view to paying the salary to Peelle, regardless of the fact as to whether he was the legal chief of the bureau or not, for the appropriation is made with a provision that it shall be paid out on the itemized account of the chief. The clause relating to Peelle evidently was inserted upon the theory that he was the legal officer. Certainly, no legislative body would so far forget its duties and obligation to the state as to endeavor to elect an officer without authority of law, and to endeavor to forestall any effort on behalf of the legally elected officer to recover the office or discharge its duties, by placing the appropriation in such condition that the salary belonging to the legal officer and incidental expenses of the office could not be recovered by the legally elected or appointed and qualified officer. To hold that the general assembly intended to provide that the person chosen by the general assembly should hold the office, right or wrong, and should receive the salary, or at least, that no other person, though legally entitled thereto, should receive the salary or draw the sum so appropriated for running such office and department of the government, would be attributing improper motives to its members. Courts should not impugn the motives of legislators; and it would be impugning their motives to hold that they intended, by the provisions of this law, to declare that the person the general assembly elected to this office should have the salary and draw the amount appropriated, though the election is illegal, and he may have no right to the salary or the money, notwithstanding another has been lawfully elected, or appointed and qualified, and become the lawful chief of said bureau. Certainly, such was not the intention of the legislature, and the act would be absolutely void if it was. The legislative department has the right, and it is its duty, to make appropriations for the payment of salaries, and the expense of running the various departments of the state government.

Whether salaries might not, in some instances, be recovered

without an appropriation is not necessary to decide, but it is certain that there is no authority to go through the formality of electing an officer to an office then in existence, though the election be void, and appropriating funds to pay the salary of the legal officer, and providing that such sum should be paid to the officer having no title to the office. To enunciate such a doctrine would be to hold that the legislature might convene and choose persons to fill all of the state offices, and appropriate money to pay the salary of the legal officer, and then declare that in such instances it shall be paid to the person so chosen by the legislature to fill such office, and to none other.

The constitution provides that no person charged with official duties under one department of state shall exercise any of the functions of another. (Art. 8, sec. 1.) The part of the law making an appropriation to pay the salary of the chief, and to pay the expense of the bureau, is the exercise of a legislative function; but that portion which declares that the said sum shall be paid to Peelle is an attempt to exercise judicial powers by declaring who is the legal chief of the bureau of statistics, and entitled to the salary, and such provision is absolutely void. There is a like provision in the law relating to other officers in charge of state institutions.

Section 4 of the act (Elliott's Supp., sec. 2239 a) provides that "if the auditor of state shall draw his warrant for any of the sums herein appropriated, or for any part thereof, to any person or persons except those herein named, when the persons to whom the same are payable are designated or named herein, or if the treasurer of state shall pay any of said sums or any part thereof, except to such persons herein named, he shall be guilty of a felony," etc.

What we have said in regard to the provision of the law relating to the naming of Peelle as the person to whom the amount shall be paid is equally applicable to this. It is, in effect, in the first instance, an attempted adjudication as to who the legal officers are, and then an effort to enforce the judgment by providing a penalty for disobeying it.

The legal officers are entitled to their salaries, and money appropriated for conducting a department of state or a public institution should be drawn by the officer legally entitled to receive it, and not by any certain person, regardless of whether he has been legally elected or is in possession of the office or not; and it is not within the province of the legislature to de-

clare in an appropriation bill who are or who are not the legally elected officers of any department. They probably may provide against the paying out of the money to any person other than the legally qualified and acting officer or officers, and subject the officer to a penalty for paying the same to any other than such officer or officers; but it cannot adjudicate as to who are the legal officers, and provide that payment shall be made to them and none other.

The conclusion we have reached is well supported by the most recent and well-reasoned cases, although there is some irreconcilable conflict in the authorities, particularly in the earlier cases.

In *Andrews v. City of Portland*, 79 Me. 484, 10 Am. St. Rep. 280, it was held that a *de jure* officer might recover his full salary from the city, notwithstanding another had been in possession of the office and kept the *de jure* officer out, and the salary had been paid to the person acting as an officer *de facto*, the city having notice that the officer *de jure* claimed he was illegally deprived of the office; that the city was not entitled to credit for what the *de facto* officer earned by his personal services. In that case the court says:—

“A *de facto* officer has no legal right to the emoluments of the office, the duties of which he performs under color of an appointment, but without legal title. He cannot maintain an action for the salary. His action puts in issue his legal title to the office, and he cannot recover by showing merely that he was an officer *de facto*. In *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730, the court says: ‘It is abundantly settled by authority that an officer *de facto* can, as a general rule, assert no right of property, and that his acts are void as to himself, unless he is also an officer *de jure*.’ In Cro. Eliz. 699, the doctrine is tersely stated as follows: ‘The act of an officer *de facto*, when it is for his own benefit, is void; because he shall not take advantage of his own want of title, which he must be conusant of; but where it is for the benefit of strangers or the public, who are presumed to be ignorant of such defect of title, it is good.’”

In a note by the Hon. A. C. Freeman to this case in the American State Reports, in speaking of the cases holding that a payment to the *de facto* officer is a good defense to an action by the *de jure* officer, he says: “These decisions have been placed partly upon the ground that the officer *de jure* had no property rights in the office, and partly upon the ground that

his right to the salary or emoluments of his office was not dependent upon the office, but upon the actual performance of his services as a public official; and further, that while there was an officer *de facto* in actual possession of the office, the disbursing officers were not entitled to consider the question of who ought to be in such possession, nor to question the title in any other way than by a proceeding in *quo warranto*. It is believed that none of these grounds are well taken, and most courts which yet maintain the general rule have substantially admitted in subsequent cases that the grounds for it did not in fact exist. In the first place, it is now well settled that an officer *de facto* is not entitled to the salary of the office, and that although he may faithfully discharge its duties, he cannot maintain any action against the city or county for the compensation to which he would be entitled if he were an officer *de jure*. . . . In the next place, if he has, in fact, received the emoluments of the office, he has no right whatever to retain them, and he may be compelled to account therefor to the officer *de jure*, in any appropriate form of action. . . . If a judgment of ouster has been entered against an officer *de facto*, and salary is thereafter paid to him, the officer *de jure* may maintain an action therefor against the city or county, notwithstanding such payment. . . . If no part of the salary has been paid during the incumbency of an officer *de facto*, the officer *de jure*, although he performed none of the duties of the office, may maintain an action against the city and county for the salary and emoluments thereof." Mr. Freeman concludes by saying: "Hence the principal case, and cases in California and Tennessee, maintain the doctrine, against the weight of authority, but in harmony, we think, with judicial principles, that the payment of the salary to an officer *de facto* in no way impairs the right of the officer *de jure* to recover such salary from the city, county, or other public body charged with the duty of making its payment."

Numerous authorities are cited in support of the doctrine as stated by Mr. Freeman, and we think it lays down the proper rule. See also *People v. Smyth*, 28 Cal. 21; *Carroll v. Sieben-thaler*, 37 Cal. 193; *People v. Oulton*, 28 Cal. 44; *Memphis v. Woodward*, 12 Heisk. 499; 27 Am. Rep. 750; *Matthews v. Board etc.*, 53 Miss. 715; 24 Am. Rep. 715; *McCue v. Wapello Co.*, 56 Iowa, 698; 41 Am. Rep. 134; *Glascock v. Lyons*, 20 Ind. 1; 83 Am. Dec. 299; *Douglass v. State*, 31 Ind. 429.

Judge Cooley, in a very able dissenting opinion in the case

of *Auditor etc. v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382, holds that the payment of salary to a *de facto* officer is not a defense to an action by the *de jure* officer, and this is in harmony with all general principles of the law. The *de jure* officer is entitled to the possession and emoluments of the office, and he is unlawfully kept out of it by an intruder.

It is inconsistent with all principles of justice and equity that such intruder and unlawful occupant shall have the emoluments for the length of time he can continue in possession; or that the person from whom the salary is due, when he has knowledge of the facts, can set up as a defense the fact that a *de facto* officer is in possession of the office and depriving the *de jure* officer of the possession of the office, though, as we have heretofore stated, it is unnecessary to go to this extent in this case, as Worrell, in addition to being a *de jure* officer, was occupying apartments set apart to him by the state, and was discharging the duties of the office as well and as fully as he could in any other place, so that he was both a *de jure* and *de facto* officer. As regards this case there was an appropriation made to pay the salary of the chief of the bureau of statistics; that money is in the treasury. The only method by which Worrell, who is such *de jure* officer, can recover his salary is by a proceeding in mandate compelling the auditor of state to draw a warrant on the treasurer for the amount.

The auditor refused to draw his warrant, and Worrell instituted this suit. The facts found show the money in the treasury; that Worrell is the *de jure* officer; that immediately upon his qualification he was assigned quarters by the auditor of state; that he has discharged the duties of the office. The only possible or pretended defense urged is, that Peelle, who had been acting as a *de facto* chief prior to Worrell's appointment, continued to occupy the apartments which he had theretofore occupied, and to gather statistics and do as he had before done, not having any title to the office, and that the appellee had, with full knowledge of all the facts, paid to Peelle \$750 of salary. These facts constitute no defense to Worrell's action for *mandamus* to compel the payment of his salary. Worrell was entitled to his mandate, and the circuit court erred in its conclusions of law.

The judgment is reversed, with instructions to the court below to restate its conclusions of law, stating that Worrell is entitled to a mandate prayed for to the full amount of salary due him, \$2,550, and to render judgment accordingly.

## SEPARATE OPINION.

ELLIOTT, J. I concur in the conclusion reached in the opinion of the court, solely upon the ground that the controversy as to the particular office in dispute is settled by the prevailing opinions delivered in the cases between the claimants to the office on former appeals. Accepting those decisions as the law of the particular controversy, as the court is bound to do, it must follow that Worrell is the rightful officer, and that, as the rightful officer, he is entitled to the compensation attached to the office. The case, in the form it has assumed, is unique, and cannot, as I suppose, be deemed a precedent justifying the inference that a state disbursing or distributing officer must, at his peril, decide a controversy between rival claimants to a public office. This I say because the doctrine of the prevailing opinions on former appeals is, that Peele did not have, and could not have, any title to the office; and upon these decisions the auditor of state could have acted without incurring any risk, inasmuch as the entire controversy as to the right to the office concerned matters of law and not of fact. In saying this I do not mean to be understood as receding from the opinions heretofore expressed upon the principal question, for I here simply yield to the doctrine declared by the court in its former decisions.

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**PUBLIC OFFICERS — RIGHT OF OFFICER DE JURE TO SALARY.** — The right of an officer *de jure* to his salary, when the office is in the possession of an officer *de facto*, is thoroughly discussed in *Andrews v. Portland*, 79 Me. 484; 10 Am. St. Rep. 230, and particularly in the note thereto, which is cited with approval in the principal case.

## SPAULDING v. HARVEY.

[129 INDIANA, 103.]

**PERSONS OF UNSOUND MIND, FRAUD OF.** — One so weak intellectually as to be incapable of managing his estate, and on that account subject to guardianship, may still be capable of perpetrating a fraud, and if he does so, the party injured thereby is not in all cases without redress.

**SUBROGATION.** — THE RIGHT OF SUBROGATION DOES NOT DEPEND UPON HOW GROW OUT of the ability of the parties to make valid contracts, and is not founded upon contract, express or implied, but upon principles of equity and justice intended to afford protection to the meritorious creditor, and to prevent the sweeping away of the fund from which in good conscience he ought to be paid.

**SUBROGATION. — MORTGAGEES DISCHARGING A PRE-EXISTING LIEN ON THE MORTGAGED PREMISES** are entitled to be subrogated thereto, if they acted in good faith, although the mortgage proved to be void for want of capacity on the part of the mortgagors to execute it.

**SUBROGATION — INSOLVENCY.** — The right to be subrogated to the securities of one who has been paid does not depend upon the solvency or insolvency of the debtor, but upon the circumstances attending the payment of the debt to which the security was incident.

*A. E. Steele and J. A. Kersey, for the appellant.*

*G. W. Harvey and H. J. Paulus, for the appellees.*

McBRIDE, J. November 28, 1886, Almaretta Lockwood, one of the appellees herein, was the owner of an undivided interest in certain land in Grant County. On that day one Josiah Ferguson recovered a judgment in the Grant circuit court against her for thirty dollars and costs, which became a lien on her interest in the land. December 28, 1886, she, with her husband and co-appellee, James H. Lockwood, were, by the Wells circuit court, adjudged of unsound mind, and incapable of managing their respective estates, and the appellant was duly appointed their guardian.

The guardianship was terminated by a judgment of the Wells circuit court, on the — day of April, 1887, declaring them restored to their right minds, and again capable of managing their estates. On the twenty-sixth day of January, 1887, the Lockwoods applied to the appellees, Harvey and Paulus, to act as their attorneys in the institution and conduct of certain litigation, and represented to them that they had been already adjudged of sound mind, and their guardianship terminated. Harvey and Paulus, not knowing that this was untrue, accepted and entered upon the duties of the employment, and to secure the compensation agreed upon, took from the Lockwoods a mortgage on the land in Grant County. On the day the mortgage was executed, the land was advertised for sale by the sheriff of Grant County, on an execution issued on the Ferguson judgment.

Harvey and Paulus, to save the land from sale, and thereby protect their mortgage, paid to the sheriff \$48.43, the amount of the judgment, with costs. This suit was originally commenced to foreclose the mortgage, but the Lockwoods and the appellant, who was joined as a defendant, attacked the validity of the mortgage, on the ground of the incapacity of the mortgagors when it was executed. The appellant, also, by a separate answer, which was supported on the trial by proof,



showed that when he was discharged as guardian the Wells circuit court allowed him, for services, money expended, etc., \$373.78, which the court adjudged to be a specific lien on the mortgaged land, and that a transcript of the judgment had been duly filed and recorded in the clerk's office of Grant County.

Harvey and Paulus thereupon, with leave of the court, and without objection from the defendants, filed a second paragraph of complaint, alleging the facts substantially as above stated, and asking to be subrogated to the lien of the Ferguson judgment. This paragraph also contained averments charging that the representations made by the Lockwoods to Harvey and Paulus, that they had been adjudged of sound mind and relieved from guardianship, were not only false, but were fraudulently made to induce them to act as such attorneys and accept said mortgage. The circuit court found these averments to be true, and adjudged the mortgage void, but sustained the claim of Harvey and Paulus to be subrogated to the lien of the Ferguson judgment, with priority over the judgment of the appellant.

This conclusion of the court is vigorously attacked by the appellant, who insists that the mortgage being void, and the mortgagors incapable of contracting, the payment by the appellees of the Ferguson judgment was voluntary, and by persons standing in the relation of strangers to the debtors, and will not entitle them to subrogation.

In this the appellant is wrong, and the judgment of the circuit court is right. True, the mortgage was void, because the mortgagors were, by the express terms of the statute, legally incapacitated from contracting. One may, however, be so weak intellectually as to be incapable of managing his estate, and thus be legally subjected to guardianship, and still be capable of perpetrating a fraud.

The court has found in this case that these parties, by means of the representations made, not only secured the services of the appellees, as attorneys, but also induced them to save their land from sale by the sheriff by paying the Ferguson judgment. It is certain that they obtained a substantial benefit. To sustain their present claim would be to relieve them wholly from liability for the Ferguson judgment, without having rendered any equivalent whatever therefor.

The statute which provides for the guardianship of those *non compos*, and for the conservation of their estates, is in-

tended to protect them from the consequences of their mental weakness, and to guard against the danger of wrong being done to them by the dishonest and the unscrupulous. It was never intended to serve as an intrenchment to shelter them from the consequences of such wrongs as their limited capacity gave them the power to knowingly perpetrate upon others.

Indeed, if no question of fraud, or of attempted fraud, entered into the transaction, it is a clear case calling for the application of the doctrine of subrogation, which does not depend upon or grow out of the ability of the parties to make valid contracts, as it is not founded upon contract, either express or implied, but upon principles of equity and justice, intended to afford protection to a meritorious creditor, and prevent the sweeping away of the fund from which, in good conscience, he ought to be paid: *Sheldon on Subrogation*, sec. 4; 3 *Pomeroy's Eq. Jur.*, sec. 1419; *Rooker v. Benson*, 83 Ind. 250.

Assume that the mortgagors as well as the mortgagees acted in good faith, when the mortgagees, to protect what they erroneously supposed was a valid mortgage, paid the judgment, they were neither strangers nor volunteers. The fact that the mortgage proved to be void because the makers had not the legal power to make it affords only stronger reasons why the equitable doctrine of subrogation should be invoked.

The second paragraph of the complaint, asking for subrogation, did not contain any averments of the insolvency of the debtors, or that they had no other property out of which the claim could be collected. Appellant demurred to this paragraph, on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer being overruled, an exception was saved to the ruling. This ruling is assigned as error, appellant insisting that the omission of such averments, or their equivalent, makes the complaint bad. The question in this case is as to the preservation of a security in favor of a creditor.

The right of a creditor to be subrogated to the securities of one whose claim he has paid does not depend upon the solvency or the insolvency of the debtor, but upon the circumstances attending the payment of the debt to which the security was an incident.

Judgment affirmed, with costs.

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INSANE PERSONS, THEIR RESPONSIBILITY FOR WRONGFUL ACTS: See *McIntyre v. Sholly*, 121 Ill. 660; 2 Am. St. Rep. 140, and note; *Mores v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349, and note.

**SUBROGATION, DOCTRINE OF.** — The doctrine of subrogation is founded on principles of equity, and not on contract: *Cheesbrough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494; *Pease v. Egan*, 131 N. Y. 262; *Insurance Co. of N. A. v. Fidelity etc. Trust Co.*, 123 Pa. St. 523; 10 Am. St. Rep. 546, and note; *Johnson v. Barrett*, 117 Ind. 551; 10 Am. St. Rep. 63, and note; *Ex parte Hardin*, 24 S. C. 377; 27 Am. St. Rep. 820, and note.

## CITY OF RICHMOND v. DUDLEY.

[129 INDIANA, 112.]

**MUNICIPAL CORPORATION, ARBITRARY ORDINANCES OF.** — An ordinance prohibiting the keeping of certain inflammable or explosive oils within the limits of a municipality, but reserving to the common council the right to grant permission to keep such oils in such locations and buildings and to such persons as it deemed suitable and proper, and to revoke such permission at any time, is void because it may enable such council to arbitrarily control business without any fixed or known rules.

**MUNICIPAL ORDINANCE PLACING RESTRICTION UPON LAWFUL CONDUCT OR THE LAWFUL USE OF PROPERTY** must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit to the exercise of the privilege all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of the opportunity for the exercise, of any arbitrary discrimination by municipal authorities between citizens who will so comply.

*A. C. Lindemuth, H. C. Fox, and J. G. Robbins*, for the appellant.

*C. H. Burchenal and J. L. Rupe*, for the appellee.

**MILLER, J.** This was an action brought before the mayor of the city of Richmond against the appellee for the violation of a city ordinance regulating the storing and keeping of petroleum and other inflammable oils within the corporate limits. Judgment was rendered against the appellee before the mayor, and the cause appealed to the Wayne circuit court. In that court demurrers were sustained to the several paragraphs of complaint, and judgment on the demurrer rendered against the appellant.

The only question before us is as to the validity of the ordinance.

The sections of the ordinance to which the objections are made are as follows: —

"Sec. 1. *Be it ordained by the Common Council of the city of Richmond*, That it shall be unlawful for any person to keep or store any petroleum, naphtha, benzine, gasoline, coal-oil, or

any inflammable or explosive oils within the corporate limits of the city of Richmond, in quantities greater than five barrels at a time, except as hereinafter provided.

"Sec. 2. Any person desiring to keep or store any of the oils or products mentioned in the first section of this ordinance within the corporate limits of the city, in quantities greater than five barrels at a time, shall present a written petition to the common council at a regular meeting thereof, setting forth an exact description of the location, premises, and buildings on and in which it is proposed to keep and store such oils and products, and the manner and kind of vessels in which the same are to be kept, the kind of oils, and the purpose for which they are to be kept.

"Sec. 3. Upon the presentation of the petition, as provided in section 2 of this ordinance, the common council may, if the location and buildings described in said petition, and the purpose and keeping of such oils and products, are deemed suitable and proper, and that the person presenting such petition is a proper person, grant such permission to the person presenting such petition to keep and store such oils and products on the premises and in the manner set forth in the petition, or in the manner which the council may direct, in quantities greater than five barrels at a time, which permission so granted may be revoked at any time at the option of the council; and the rights and privileges to be exercised by the person receiving said permission shall not be assignable or transferable, by the person receiving the same, to any other person directly or indirectly, and any attempt so to do shall be deemed a revocation of all rights and privileges on the part of the person making the attempt."

Two objections are urged against the validity of this ordinance: 1. That it gives to the council the power to arbitrarily discriminate between citizens by giving the permission to some and withholding it from others under similar conditions, and because it specifies no terms or conditions to be observed in the keeping or storing of such oils which could be complied with by all citizens alike; 2. That the ordinance is unreasonable, and is an undue restraint upon lawful trade and business.

The subject covered by the ordinance in question is clearly within the police power conferred by the charter upon the municipality.

Section 3155 of the Revised Statutes of 1881 provides that

the common council of a city shall have power to make by-laws and ordinances not inconsistent with the laws of the state, and necessary to carry out the objects of the corporation.

The danger to be apprehended to life and property from the storing of inflammable or explosive substances in large quantities within the limits of a city is so great as to invite legislative control of the same by the city government.

The principal question in this case is, whether or not the ordinance in question is a valid exercise of that power.

It will be observed that this ordinance does not establish any general rules for the storage of the substances proposed to be regulated, but reserves to itself, at regular meetings, the right to grant or refuse permission to keep and store such oils, dependent upon whether it at such time deems the location and buildings suitable for such purpose, and the person presenting the petition "a proper person." It further provides that the permission when granted "may be revoked at any time at the option of the council."

Language better calculated to enable the common council to arbitrarily control the business, without any fixed or known rules, cannot well be imagined. The business of keeping, storing, and dealing in such oils is a legitimate business, and every citizen has an inherent right to engage in the business upon equal terms with any other citizen.

In the case of *Bills v. City of Goshen*, 117 Ind. 221, an ordinance of the city requiring a license for carrying on the business of roller-skating, and providing that such license should be issued upon the payment into the city treasury of such sum of money "as the mayor or common council shall determine in each particular case," was held invalid, the objection being that a discretion was lodged in the mayor or common council in fixing the fee to be charged. In the opinion this language is quoted with approval from *Horr and Bemis on Municipal Police Ordinances*: "The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses."

In *Yick Wo v. Hopkins*, 118 U. S. 356, an ordinance of the city of San Francisco, prohibiting the carrying on of laundries without a permit from the board of supervisors, except in buildings constructed of stone, was held invalid. The court says: "It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restric-

tion the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living."

In *Mayor etc. v. Radecke*, 49 Md. 327, 33 Am. Rep. 239, an ordinance of the city of Baltimore prohibiting the use of steam-whistles without the permit of the mayor was held invalid. The objection to the ordinance was, that it permitted him to exercise his own discretion in revoking a permit, without general rules to guide or control his action.

In *Barthel v. City of New Orleans*, 24 Fed. Rep. 563, an ordinance was held invalid which made it unlawful to maintain a slaughter-house, "except permission be granted by the council of the city of New Orleans."

In *State v. Mahner*, 43 La. Ann. 496, an ordinance of the city of New Orleans forbidding the keeping of dairies within certain limits, except by the permission of the city council, was held to be null and void.

In *City of Newton v. Belger*, 143 Mass. 598, an ordinance which permitted the board of aldermen to exercise a discretion in granting or refusing a permit for the erection of buildings within a fire district was held invalid.

Ordinances, apparently aimed at the Salvation Army, prohibiting marching through the public streets without first obtaining the consent of the mayor or common council, or some other specified officer, not containing regulations operating uniformly on all processions, have been held invalid in *Matter of Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310; *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; and *City of Chicago v. Trotter*, 136 Ill. 430.

It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business; and must admit of the exercise of

the privilege by all citizens alike who will comply with such rules and conditions; and must not admit of the exercise, or of an opportunity for the exercise, of any arbitrary discrimination by the municipal authorities between citizens who will so comply.

We are of the opinion that the ordinance under consideration is objectionable for the reasons indicated.

Having arrived at a conclusion that will necessarily not only dispose of the case, but invalidate the ordinance, we deem it unnecessary to pass upon the other objection to its validity.

The ordinance in its present form cannot be enforced, and if another one should be enacted, we must presume that the municipal authorities will, in their wisdom, enact a proper and reasonable ordinance.

Judgment affirmed.

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**MUNICIPAL CORPORATIONS — ORDINANCES.** — A municipal ordinance must be reasonable, consonant with the powers and purposes of the municipality, not inconsistent with the laws of the state: *Ex parte Green*, 94 Cal. 387; and must not violate any recognized principle of legal rights: *State v. Mahner*, 43 La. Ann. 496; nor be in restraint of trade: *Millertown v. Bell*, 123 Pa. St. 151; *Brooks v. Mangan*, 86 Mich. 576; 24 Am. St. Rep. 137, and note; *Kosciusko v. Slomberg*, 68 Miss. 469; 24 Am. St. Rep. 281, and note; *Chaddock v. Day*, 75 Mich. 527; 13 Am. St. Rep. 468, and note; *Anderson v. Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 632-640. In *Mayor etc. of Baltimore v. Rulecke*, 49 Md. 217, 33 Am. Rep. 239, an ordinance prohibiting any person from putting up a stationary steam-engine in a city without the consent of the mayor and common council, and allowing the revocation of such permits, and compelling the removal of such engines on six months' notice, under a prescribed penalty, was held to be unreasonable and void. In *Matter of Frazer*, 63 Mich. 396, 6 Am. St. Rep. 310, an ordinance providing that "no person . . . shall march, parade, ride, drive in or upon or through the public streets of the city, . . . with musical instruments, . . . without first having obtained the consent of the mayor or common council, etc.; but such processions, as well as those having the permit or consent of the mayor or common council, when using the public streets of such city, shall conform to such directions as the mayor or chief of police may give in relation to the streets to be used and the portion thereof to be occupied by them, and in relation to the manner of such use," — was decided to be unreasonable and void, on the ground that it suppressed what ordinarily was lawful, and because it left the power of permitting or restraining processions and their courses to an unregulated discretion. In *State v. Mahner*, 43 La. Ann. 496, an ordinance which prohibited dairies within certain limits, and gave the common council the power to grant permission to maintain them within such limits, for the same reasons was held to be void. On this subject also consult *State v. Tenant*, 110 N. C. 609; *post*, 715, and note.

## FIRST NATIONAL BANK OF MT. VERNON v. SARLLS.

[129 INDIANA, 201.]

**MUNICIPAL ORDINANCE — INJUNCTION TO PREVENT VIOLATION OF.** — Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances *per se*, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property.

**MUNICIPAL ORDINANCE. — INJUNCTION WILL ISSUE AT THE SUIT OF PROPERTY HOLDERS** to prevent the rebuilding or repairing of wooden buildings in violation of a municipal ordinance establishing fire limits, and declaring it to be unlawful to alter, repair, or rebuild any frame or wooden building within the limits so established, when it is alleged that if the rebuilding or repairing is permitted, the buildings of the complainants will be thereby made more liable to destruction by fire, and the rate of fire insurance will be increased, and the value of the property depreciated.

**PRACTICE — JOINDER OF PARTIES. — OWNERS OF SEPARATE PARCELS OF REAL PROPERTY** may unite in a suit to enjoin the repairing or rebuilding of a wooden building within the fire limits of a municipality, whereby their property will be diminished in value, and subjected to increased danger of destruction by fire. Their common danger and common interest in the relief sought authorize them to join in one action.

**MUNICIPAL CORPORATIONS HAVE POWER TO ENACT REASONABLE ORDINANCES TO SECURE PROTECTION AGAINST FIRE**, and while this power may be limited by the legislature, no limitation will be presumed from a statute enumerating some of the common-law powers of municipalities, but not mentioning this power. A municipal corporation has power to enact an ordinance prohibiting the altering, repairing, or rebuilding of wooden buildings within specified limits, in such a manner as to menace the public safety or to endanger adjacent property, under a statute conferring upon it authority to establish fire limits, and to prevent the erection of wooden buildings in such parts of the city as the council may determine.

**NUISANCES. — MUNICIPAL CORPORATIONS** have, without statutory authority, ample power at the common law to cause the abatement of a nuisance, and if it cannot be otherwise abated, they may destroy the thing which constitutes or creates it.

**MUNICIPAL CORPORATIONS ARE NOT, AT THE COMMON LAW, AUTHORIZED TO INTERFERE WITH THE ERECTION OR REPAIR OF BUILDINGS**, except to prevent the doing of that which, from its nature, would have a tendency to create or enhance danger.

**A MUNICIPAL ORDINANCE PROHIBITING THE ALTERING, REPAIRING, OR REBUILDING OF ANY FRAME OR WOODEN BUILDING** situate within specified limits, whenever the amount required to alter, rebuild, or repair shall exceed three hundred dollars, is arbitrary, unreasonable, and void, because it prohibits all repairs, whether amounting practically to a rebuilding or not, and whether creating a nuisance, or made with inflammable material or not. Such an ordinance, if sustained, might compel the owner of valuable property to let it become valueless for want of proper repairs, and result in the taking of his property without due process of law, and without the sanction of that overriding necessity by virtue of which, at times, the right of the individual may be sacrificed to the public good.



**CONSTITUTIONAL LAW.** — POLICE REGULATIONS MUST HAVE REFERENCE TO THE COMFORT, the safety, or the welfare of society. Rights of property cannot be invaded under the guise of the police power, nor can the legislature constitutionally declare an act or thing to be a common nuisance which palpably, according to our present experience or information, is not, and cannot be, under any circumstances, a common nuisance by a common-law definition or common-law decision.

*E. M. Spencer and W. P. Edson*, for the appellants.

*G. V. Mensies and W. S. Jackson*, for the appellees.

**McBRIDE, J.** This case involves the validity of the second section of an ordinance of the city of Mt. Vernon, entitled "An ordinance concerning the prevention of fires."

The first section, the validity of which is not called in question, establishes fire limits, and prescribes the material which may be used in the erection of buildings within these limits. The second section is as follows:—

"Sec. 2. It shall be unlawful for any person to alter, repair, or rebuild any frame or wooden building situated within the limits defined and described by this ordinance, whenever the amount required to alter, repair, or rebuild, shall equal or exceed the sum of three hundred dollars.

"Any person violating the provisions of this section may be fined in any sum not less than two dollars, nor more than one hundred dollars, with costs; and each day that workmen are employed on such building shall constitute a distinct offense."

The complaint charges, in substance, that the appellees were the owners of certain real estate in Mt. Vernon, and within the fire limits prescribed by the ordinance in question, upon which they were threatening to, and had commenced to, rebuild and repair certain frame buildings, at a cost exceeding three hundred dollars, which had previously been partially destroyed by fire. The appellants (plaintiffs below) are shown to be each the owners of certain other tracts of land, either adjacent to or in the immediate vicinity of the appellees' building, on which valuable buildings have been erected; and they charge that by reason of the threatened repairing and rebuilding by the appellees, the danger of the destruction by fire of their respective buildings is "greatly increased, and made more imminent, thereby diminishing the value of said plaintiffs' real estate, and increasing the rate of fire insurance thereon, to the irreparable injury and damage of the said buildings on each and all of the said pieces of real estate so

as aforesaid owned by the plaintiffs, and is an obstruction to the free use by the plaintiffs of their said property, and interferes with the comfortable enjoyment thereof," etc. Prayer for an injunction.

The circuit court sustained a demurrer to the complaint, and rendered judgment for costs in favor of the appellees.

Three questions are presented and discussed: 1. Will injunction lie in such a case? 2. If so, is there a misjoinder of parties plaintiff? 3. Is the section of ordinance in question valid?

As a rule, a court of equity will not, at the suit of a city, restrain by injunction the threatened violation of an ordinance of such city regulating the erection of buildings for the purpose of greater security against damage by fire: 15 Am. & Eng. Ency. of Law, 1172; *Village of St. Johns v. McFarlan*, 33 Mich. 72; 20 Am. Rep. 671; *President etc. of Waupun v. Moore*, 34 Wis. 450; 17 Am. Rep. 446; *Mayor etc. v. Thorne*, 7 Paige, 281; *Mayor of Manchester v. Smyth*, 64 N. H. 380.

Nor will the courts thus interfere, at the suit of an individual, when such interference is sought solely for the enforcement of the ordinance, and not because of special damage threatening the party asking such interference.

Some of the authorities above cited affirm that to warrant the application of the restraining power to prevent the erection of buildings in violation of a city ordinance, the act sought to be restrained must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance.

We can see no good reason for the distinction. Where it is shown that the erection of a building, if permitted, will be in express violation of a valid municipal ordinance, although it would not be a nuisance *per se*, an individual who shows such fact, and shows in addition that its erection will work special and irreparable injury to him and to his property, is entitled to relief by injunction.

It is only where the injury is general and public in its effects, and no private right is violated, in contradistinction to the rights of the rest of the public, that individuals are precluded from bringing private suits for the violation of their individual rights: *Blanc v. Murray*, 36 La. Ann. 162; 51 Am. Rep. 7; *Wood on Nuisances*, secs. 645 et seq.; *McCloskey v. Kresling*, 76 Cal. 511; *Horstman v. Young*, 13 Phila. 19; *Rand v. Wilber*, 19 Ill. App. 395; *Mayor etc. v. Hoffman*, 29 La. Ann. 351; 29 Am. Rep. 345.)

In the case at bar it is charged by the averments in the complaint that the threatened act will be in violation of a municipal ordinance, and that it will work special and irreparable injury to the property of the petitioners. They have the right to maintain the action.

There is no misjoinder of parties plaintiff. While the appellants are shown to be the owners of separate and distinct tenements, and thus are not united in interest with each other, there is one object of common interest among all of them.

They all claim one general right to be relieved from that which they insist is a nuisance, and which alike affects all of them. Their common danger and common interest in the relief sought authorize them to join in the action: *Tate v. Ohio etc. R. R. Co.*, 10 Ind. 174; 71 Am. Dec. 309, and authorities there cited; *Town of Sullivan v. Phillips*, 110 Ind. 320.

The question as to the validity of the ordinance presents much greater difficulty.

There can be no doubt that in this state cities possess ample power to enact and enforce reasonable ordinances to secure protection against fire. In the absence of express statutory authority, the enactment and enforcement of reasonable regulations of this character are recognized as a legitimate exercise of the police power necessary to the safety of the city: *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830; *Hasty v. City of Huntington*, 105 Ind. 540; *Clark v. City of South Bend*, 85 Ind. 276; 44 Am. Rep. 18, and authorities cited in each; also *Mayor etc. v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345; *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89; *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188; *City of Salem v. Maynes*, 123 Mass. 372; *City of Troy v. Winters*, 4 Thomp. & C. 256; *McKibbin v. Fort Smith*, 35 Ark. 352; *Klingler v. Bickel*, 117 Pa. St. 326.

In addition to the power thus possessed, clause 32 of section 3106 of the Revised Statutes of 1881, enumerating the powers conferred upon cities, confers express authority to establish fire limits, and prevent the erection of wooden buildings in such parts of the city as the common council may determine. The statutory authority is still further extended by clause 5 of the same section, and by section 3155, known as the general-welfare clause.

Counsel for the appellee insist, however, that the enactment of the statutes in question served as a limitation upon the power of the city; that the powers therein enumerated, and

more, belonged to the city at common law, and that by the statutory enumeration of certain specific powers, all others not thus enumerated are excluded. *Expressio unius est exclusio alterius* has no application. The statute, in so far as it enumerates common-law powers previously possessed by the municipality, is merely declaratory of the common law. But while it is no doubt competent for the legislature, in creating such corporations, to deprive them of all common-law police power, and enact that they shall possess and exercise such only as are conferred by statute, such intention of the legislature will not be inferred simply because some of the common-law powers are enumerated, while no mention is made of others.

In the exercise of these powers, they may not only prescribe where wooden buildings may and where they may not be erected, but they may undoubtedly exercise a reasonable control over the making of repairs on all buildings, whether of wood or not, and may prevent the use of inflammable or otherwise dangerous material in making such repairs.

It can hardly be doubted that if the owner of a building proposed to make repairs or additions to it of such material or in such manner as to seriously menace the public safety, or to greatly endanger adjacent property, the city authorities have ample power to interfere and prevent the making of such repairs or additions: *City Council v. Louisville etc. R. R. Co.*, 84 Ala. 127; *King v. Davenport*, 98 Ill. 305; 38 Am. Rep. 89.

They also have full power to abate nuisances, and may, if necessary, remove or compel the removal of buildings which have for any cause become nuisances, by getting in such condition that they greatly endanger the public health or safety, or the safety of adjacent property, provided the danger inheres in the building, and not simply in the use to which the building is put.

Here, also, although the statute gives ample authority, they have, without statutory authority, ample power at common law to cause the abatement of the nuisance; and if it cannot be otherwise abated, they may destroy the thing which constitutes or creates it: *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830, and authorities cited.

They may also remove or compel the removal of wooden buildings erected in violation of a valid ordinance; not necessarily because the building thus erected is a nuisance, but be-

cause its erection was in violation and defiance of the law, and its owner cannot complain when the law is vindicated by its removal. If it were possible to so prepare wood that it would be absolutely non-inflammable, and that a building erected of it would be fire-proof, and safer than one erected in the ordinary way of stone or brick, a building thus erected of wood, in violation of a valid ordinance enacted under clause 32 of section 3106 of the Revised Statutes of 1881, forbidding such erection, would be as much subject to removal or destruction by the authorities as if it were constructed of wood not thus prepared.

It is manifest, therefore, that the right to remove or destroy the building thus erected in violation of an ordinance does not grow out of the fact that it is a nuisance, as a building made out of such material, if otherwise skillfully and properly constructed, would be as safe or safer than one built in the ordinary way, of stone and brick, and could not be a nuisance. As is said in *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830: "A municipal corporation has no power to treat a thing as a nuisance which cannot be one." See also *Wood on Nuisances*, sec. 823; *Yates v. Milwaukee*, 10 Wall. 497; *Matter of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636.

The power in such case to compel the removal of the building grows solely out of the fact that its erection was in violation of the ordinance.

The discovery of a process by which wood could be made non-inflammable, and in all respects as safe to be used in the construction of buildings as stone or brick or iron, would end the common-law power of the city to prohibit the erection of wooden buildings, or its power under the general-welfare clause, while under the statute that power would still exist, simply because the material was wood, and not at all because it was dangerous.

So with the power to remove buildings already erected. There is no express legislation on the subject, and such powers as the city has are its common-law powers, reinforced by the general-welfare clause of the statute.

As above shown, a building erected in violation of a valid ordinance may be removed without reference to its character; but with this exception, cities can only condemn as nuisances and compel the removal of buildings which are in themselves, for some reason, dangerous or hurtful.

The author of a valuable work on the law of nuisances states

the law as follows: "Nor does the power to abate nuisances warrant the destruction of valuable property which was lawfully erected, or anything which was erected by lawful authority. It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance, or otherwise, anything a nuisance which the caprice or interest of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and even if such power is expressly given by the legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it": Wood on Nuisances, sec. 823. See also the opinion by Justice Miller in *Yates v. Milwaukee*, 10 Wall. 497.

This may serve to indicate the scope of the common-law powers of the city in this direction, and the additional powers given by the statute.

At common law they are only authorized to interfere with the erection or repair of buildings far enough to prevent the doing of that which from its nature would have a tendency to create or enhance danger.

There is in this state no statute purporting to give to cities any power to prevent the repair of wooden buildings. If they have such power it is derived either from the general-welfare clause, or it is an incident of their common-law police power. The section of the ordinance in question, if valid, absolutely prohibits the altering or repairing of all frame or wooden buildings within the fire limits in all cases where the cost of altering or repairing will equal or exceed three hundred dollars. It makes no difference what material is to be used in making the repairs, or what the effect may be on the building. Repairing with fire-proof material is equally prohibited with repairs from dangerous and inflammable material. A repair which would tend to diminish danger falls under the ban equally with those the tendency of which would inevitably increase it.

It makes no difference whether the building was erected before or after the establishment of fire limits, or what its value is. Its value may be trifling. It may be a mere wreck or remnant, which three hundred dollars would practically rebuild, or it may be valuable, worth many thousands of dollars, and the cost of the repairs, although three hundred dollars or

more, relatively insignificant. It may also be that no other building is near it to be affected or endangered.

As we have heretofore said, we do not doubt that cities may exercise a reasonable control over the making of repairs to buildings, and may prevent alterations and repairs which would create nuisances. This they can do even in the absence of statutory authority, in the exercise of the police power. And where fire limits are established, they may doubtless prevent the repair of a wooden building within such limits, when to repair would practically be to rebuild, whether such repairs would create a nuisance or not. They cannot, however, at least without express statutory authority, enforce a general, sweeping prohibition of all repairs. Whether a statute attempting to confer such power would be constitutional we need not, of course, decide in this case, but a consideration of some of the possible effects of such an ordinance may well suggest a query of that character.

To repair a building means simply to restore it to a sound condition. The natural and probable effect of repairing, if carefully done, would be to diminish danger, instead of to increase it. Certainly a building so much injured or otherwise out of repair as to require three hundred dollars to repair it is more likely to endanger the public and surrounding property than if put in proper repair.

If it is lawful to maintain it without repairs, how can the police power afford any justification for a refusal to allow its owner to remedy the effects of accident or decay and restore it to a sound condition?

To hold that this was a proper exercise of the police power would be to pervert entirely the use of that power which is designed to protect society and prevent the doing of things inimical to its well-being.

Such an ordinance might, in many cases, compel the owner of valuable property to stand by and allow it to become valueless, and a nuisance, without the power to prevent it. The accidental destruction or removal of a roof, which it would cost three hundred dollars to replace, might thus reduce valuable property to the condition of a mere heap of material. It is not simply a restraint on a noxious or improper use of property by its owner, but prohibits him doing that which alone will in many cases save his property from becoming a noxious and dangerous thing. Instead of restraining him from so using it as to make it pernicious to his neighbors, it

would compel him by inaction to allow it to become and remain so. It might unquestionably, in many cases, amount to a taking of the property of the citizen without due process of law, and without the sanction of that overriding necessity by virtue of which, at times, the right of the individual may be sacrificed for the public good.

In *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, Justice Earl, speaking for the court, says: "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property. The constitutional guaranty would be of little worth, if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein. . . . In *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (177), Miller, J., says: 'There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the constitution.' . . . But the claim is made that the legislature could pass this act in the exercise of the police power which every sovereign state possesses. That power is very broad and comprehensive, and is exercised to promote the health, comfort, safety, and welfare of society. Its exercise in extreme cases is frequently justified by the maxim, *Salus populi suprema lex est*. It is used to regulate the use of property by enforcing the maxim, *Sic utere tuo ut alienum non lædas*. Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice



must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons, and so far as it imposes restraints the police power must be exercised in subordination thereto. . . . In Potter's *Dwarris on Statutes*, 458, it is said that 'the limit to the exercise of the police power can only be this: the legislation must have reference to the comfort, the safety, or the welfare of society.' "

In *Inhabitants etc. v. Mayo*, 109 Mass. 315 (319), 12 Am. Rep. 694, Colt, J., says: "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health, or protection against a threatened nuisance."

In *Slaughter-House Cases*, 16 Wall. 36 (87), Field, J., says: "Under the pretense of prescribing a police regulation, the state cannot be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment."

In *Coe v. Schultz*, 47 Barb. 64, a learned judge, speaking of the constitutional limitations upon the police power, says: "I am not willing to concede that the legislature can constitutionally declare an act or thing to be a common nuisance which palpably, according to our present experience or information, is not and cannot be, under any circumstances, a common nuisance by the common-law definition or common-law decisions. . . . Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive."

The author of *Tiedeman on Limitations of Police Powers* says: "An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands, is a taking of private property without due process of law, which is inhibited by the constitution. . . . One can lawfully make use of his property only in such a manner as that he will not injure another. Any use of one's land to the hurt or annoyance of another is a nuisance, and may be prohibited": Sec. 122.

"But the police power of the legislature, in reference to the prohibition of nuisances, is limited to the prohibition or regulation of those acts which injure or otherwise interfere with the rights of others. The legislature cannot prohibit a use of lands which works no hurt or annoyance to the neighbors or adjoining property. The injurious effect of the use of the

land furnishes the justification for the interference of the legislature. The legislative prohibition or regulation of the use and enjoyment of one's private property in land is in violation of constitutional principles, which is not confined to the prevention of a nuisance. A certain use of lands, harmless in itself, does not become a nuisance because the legislature has declared it to be so": Sec. 122 a.

This author also tersely and correctly states the full scope of restrictive police regulations, when confined within their proper limits, substantially as follows: To compel every one to so use his own, and so conduct himself, as not to injure others or infringe upon their rights.

Tried by these tests, the second section of the ordinance in question, in so far as it relates to the repair of wooden buildings, is clearly invalid. It arbitrarily attempts to take from the owner of property all power to make repairs necessary for its preservation, or necessary for its enjoyment, regardless of the effect which such repairs may have upon the public, upon adjacent property, or upon the rights of others; and applies with equal force to buildings detached and remote from all others as to those in immediate proximity to others; and not only to repairs which would tend to create danger, but also to those which would serve to remove or diminish it.

It will not be contended by any one that the establishment of fire limits will justify the condemnation and removal of wooden buildings previously constructed, simply because they are wooden buildings. Before their destruction or compulsory removal can be justified they must become nuisances.

Yet this ordinance, by forbidding repairs, would accomplish by indirection what could not be done directly. It would first compel the owner to allow it to become and remain a nuisance, and then punish him for so doing by destroying or removing his property.

We have not been able to find an authority anywhere which would sustain appellants' position in this case. The case of *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, cited by them, holds that under the charter of the city of Detroit, which expressly authorized the enactment of an ordinance forbidding repairs to wooden buildings, an ordinance which forbade such repairs without the consent of the common council was valid. That case, in two essential particulars, differed from the case at bar: 1. The charter gave express authority to enact the ordinance; and 2. The ordinance then in question was not

prohibitory, but allowed repairs when consent was first obtained of the common council. The opinion was by a divided court, Campbell, J., filing a strong dissenting opinion, holding the ordinance invalid as applied to a building erected before its enactment, notwithstanding the charter.

The case of *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89, was also a case where the charter of the city of Jacksonville conferred express authority, and the ordinance in question only forbade the building or repairing of buildings within the fire limits with other than fire-proof material. A party removed an old shingle-roof from her building, and replaced it with a new shingle-roof. Failing to remove it upon notice, the city marshal removed it. It was held that under the express authority conferred by the charter the ordinance was valid. The ordinance in that case, instead of prohibiting repairs, simply prescribed the material that might be used in making repairs. These two cases are the only ones cited by the appellants upon the question of the right to prohibit repairs, although many others are cited upon the general power of the city in the establishment of fire limits, and their power to prohibit the erection of buildings. Other authorities bearing upon the right to prohibit or to regulate repairs are as follows: *Horr and Bemis on Municipal Police Ordinances*, p. 214, says: "The making of ordinary repairs to existing buildings cannot be prohibited. They must amount to additions or material alterations. Reshingling a building, for example, is an ordinary repair." See also, to the same effect, *Regina v. Howard*, 4 Ont. 377; *Brown v. Hunn*, 27 Conn. 332; 71 Am. Dec. 71; *Stewart v. Commonwealth*, 10 Watts, 307.

The case of *Ex parte Fiske*, 72 Cal. 125, was a case where an ordinance prohibited the alteration or repair of wooden buildings within the fire limits without permission or authority from the firewardens. The court discusses, at some length, the provision that certain officers may grant permission to make repairs, and says: "It is clear, however, that a literal compliance with a regulation prohibiting the repairing of a wooden building might work, in some instances, useless hardships. The repair of a leaking roof or broken window would be necessary to the comfort and health of a family, without enhancing the danger which the framers of the ordinance sought to provide against; and repairs of a more extensive character might be made to particular houses, standing in particular localities, without increasing the fire risks. And it is equally clear that

no general rule could be established beforehand that would meet the emergencies of individual cases. Therefore the power to give relief in particular instances is conferred on certain officers; and it is not to be presumed that they will exercise wantonly, or for purposes of profit or oppression." The court concludes that the conferring of the discretionary power on the firewardens was valid, and sustained the ordinance.

The case of *City Council v. Louisville etc. R. R. Co.*, 84 Ala. 127, was a case where an ordinance prohibited repairing the roof of buildings within the fire limits with wood or other inflammable material. Like *King v. Davenport*, 98 Ill. 305, 5 Am. Rep. 89, it did not prohibit making repairs, but forbade the use of certain material in making them.

In *State v. Schuchardt*, 42 La. Ann. 49, it is held that a legislative mandate, authorizing a municipal corporation to prevent the reconstruction in wood of old buildings within certain limits, does not include the mandate to prevent the repair with shingles of the roofs of buildings originally covered with shingles.

It will be observed, on examining these cases with others that more or less directly bear upon the question involved, that there is wide diversity in the interpretation given to the law in the different courts. Some go so far as to deny the power to interfere at all with the making of ordinary repairs. The weight of authority, however, is clearly with those cases which recognize the power of municipal corporations to regulate the making of repairs to buildings, and treat it as a legitimate exercise of the police power, but none of them go to the extent of sustaining the power of absolutely prohibiting repairs, as sought to be done in this case.

The complaint contains no averments showing the value of the building proposed to be repaired. It is possible that the part remaining will be of small value, and that this is a case where to repair will mean a substantial rebuilding of the structure. If so, however, it would have been easy to show such fact by specific averment. As it is, we are unable to say, from any averment in the complaint, that the proposed repairs, costing three hundred dollars or more, may not be very small compared with the value of that portion of the building which remains, and that to restore or rebuild it may not be to preserve valuable property, and to prevent instead of create nuisance.

In our opinion, the circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

**MUNICIPAL CORPORATIONS — ORDINANCES TO SECURE PROTECTION AGAINST FIRE.** — As to the power of a city to establish and enforce fire limits, see *Monroe v. Hoffman*, 29 La. Ann. 651; 29 Am. Rep. 345, and note 347-349; *Charleston v. Reed*, 27 W. Va. 681; 55 Am. Rep. 336; *Olympia v. Mann*, 1 Wash. 389. An ordinance prohibiting the erection of wooden buildings within certain limits of a city, and providing for the removal of any building erected contrary to its provisions, is valid: *Baxter v. Seattle*, 3 Wash. 352; *Olympia v. Mann*, 1 Wash. 389. In *Ex parte Fiske*, 72 Cal. 125, an ordinance prohibiting the alteration or repair of any wooden building within certain designated fire limits without permission in writing from the firewardens, etc., was held to be reasonable and valid.

**MUNICIPAL CORPORATIONS — ORDINANCES — INJUNCTION.** — Ordinarily an injunction will not issue against the construction of a building, on the ground that it will be a violation of a city ordinance: *Janesville v. Carpenter*, 77 Wis. 238; 20 Am. St. Rep. 123; *St. John v. McFarlan*, 33 Mich. 72; 20 Am. Rep. 671.

**NUISANCES — INJUNCTION ISSUED AT THE REQUEST OF A PRIVATE PERSON, WHEN.** — A private person may seek relief by injunction against a nuisance which works a special and peculiar injury to him: *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813; *Jackson v. Kiel*, 13 Col. 378; 16 Am. St. Rep. 207, and note; *Wylie v. Elwood*, 134 Ill. 281; 23 Am. St. Rep. 673, and note; *Talbot v. King*, 32 W. Va. 6; *Kavanagh v. Barber*, 131 N. Y. 211; *Cranford v. Tyrrell*, 128 N. Y. 341.

**MUNICIPAL CORPORATIONS — POWER TO DECLARE WHAT IS A NUISANCE.** — As to the power of a municipality to declare what is a nuisance, and abate the same, see *Easton etc. Ry Co. v. Easton*, 133 Pa. St. 505; 19 Am. St. Rep. 658, and note. A city cannot declare that to be a nuisance which is not such in fact: *Ex parte O'Leary*, 65 Miss. 180; 7 Am. St. Rep. 640, and note; *Tissot v. Great etc. Telephone*, 39 La. Ann. 996; 4 Am. St. Rep. 248, and note.

**NUISANCE, ABATEMENT OF.** — AS TO THE POWER TO DESTROY PROPERTY used so as to constitute a nuisance to the public, see *Lawton v. Steele*, 119 N. Y. 226; 16 Am. St. Rep. 813; *Theilan v. Porter*, 14 Lea, 622; 52 Am. Rep. 173; *Fields v. Stokley*, 99 Pa. St. 306; 44 Am. Rep. 109.

**MABIN v. WEBSTER.**

[129 INDIANA, 480.]

**PRACTICE** — A MOTION TO STRIKE OUT admits the truth of all the facts well pleaded, and therefore should not be sustained if the facts stated are relevant to the question to which they are addressed, though not sufficient to withstand a demurrer. Such a motion does not perform the office of a demurrer.

**PLEADING** — **GENERAL DENIAL** — THE RESCISSION OF A CONTRACT must be alleged as an affirmative plea, and therefore cannot be presented as a defense under the general denial.

**IN AN ACTION FOR A BREACH OF CONTRACT TO MARRY**, the defendant is entitled to prove, in mitigation of damages, that at the time of such breach he was afflicted with an incurable disease, and that marriage would have an injurious effect upon him, and probably shorten his life, because the advantage to the plaintiff of a union with such a man would be much less than if he were in full health and vigor, with a reasonable expectation of long life and good health.

*W. S. Holman, W. S. Holman, Jr., J. K. Thompson, and A. C. Downey*, for the appellant.

*H. D. McMullen, W. R. Johnston, H. McMullen, G. M. Roberts, and C. W. Stapp*, for the appellee.

**OLDS, J.** This is an action to recover damages for an alleged breach of a marriage contract.

The first error assigned is, that the court erred in overruling the appellant's motion to reject parts of the complaint, and the second error assigned is the overruling of the appellant's demurrer to the complaint.

We do not deem it necessary to set out the complaint, or any portion of it, for it is clearly sufficient to withstand a demurrer, and the motion to reject parts was intended to take the place of, and is to the same effect as, a motion to strike out parts of the complaint, and there was no error in overruling the motion.

The next alleged error is in sustaining a motion to reject the third paragraph of appellant's answer.

This ruling of the court struck out the third paragraph of appellant's answer. Under our practice it is more commonly called a motion to strike out than to reject.

The third paragraph of answer was an attempt to plead a rescission of the marriage contract. The question as to whether or not it is properly pleaded so as to withstand a demurrer is not before us.

A motion to strike out admits the truth of all the facts well pleaded for the purpose of the motion, and the motion should

not be sustained if the facts stated in the paragraph are relevant or pertinent to the question to which they are addressed, though not sufficient to withstand a demurrer. This is the doctrine as held by this court in the case of *Chicago etc. R'y Co. v. Summers*, 113 Ind. 10, 3 Am. St. Rep. 616, and is well supported by authority. Such a motion will not perform the office of a demurrer: *Burk v. Taylor*, 103 Ind. 399. The rescission of the contract was a proper defense to be pleaded to the action, and such defense was not admissible under any other paragraph of answer.

It is contended by counsel for appellee that such defense was admissible under the general denial which was pleaded.

A plea alleging a rescission of contract is an affirmative plea. It admits the making of the contract, and alleges a rescission of it. The court erred in striking out the third paragraph of answer.

The sustaining of a demurrer to the fourth paragraph of appellant's answer is assigned as error.

This paragraph attempts to plead that the appellant was afflicted with epilepsy, rendering it unsafe and improper for him to consummate the marriage contract with appellee. The paragraph is so indefinite and defective in its allegations of fact as to be clearly bad, even if the defense attempted to be pleaded would be good if properly pleaded. There was no error in sustaining the demurrer to this paragraph.

It was claimed on behalf of the appellant that he was afflicted with epilepsy, which was incurable, and that the assumption of marital relations would aggravate the disease, and produce both physical and mental weakness and hasten his death.

On the trial of the cause the appellant offered to read, in his own behalf, the deposition of one T. C. Smith, a competent physician. The witness testified to the appellant having epilepsy, and having treated him for the same during 1883 and 1884.

The appellee objected to the reading of questions 8 and 9, and the answers thereto, which objection was sustained and proper exceptions reserved, and it is contended that such ruling is error. Questions 8 and 9, and the answers thereto, are as follows: —

"Q. 8. I ask you, as a medical expert, the following question: What would be the probability of ultimate recovery of a man fifty years of age who has been afflicted with epilepsy for

a period of five years or more, the epileptic fits being of a violent character, and occurring at irregular intervals of from three to fifteen times a year? A. There would be little, if any, probability of recovery. It is possible, but not at all probable.

"Q. 9. What effect would marriage probably have upon a man fifty years of age who has never been married, who is and has been subject to epileptic fits during a period of ten years, the attacks becoming more frequent from their incipency,—I mean upon the mental and physical health of the man? A. The probable effect would be an increased frequency of the attacks of epilepsy, with tendency to increase physical and mental weakness and hastening of death."

There is no contention but that the hypothetical case is applicable to the facts. The question presented is as to whether or not it is competent in such a case for the defendant to prove, in mitigation of damages, that at the time of the breach he is afflicted with an incurable disease, and that marriage would have an injurious effect upon him, and probably shorten his life.

In an action for breach of a marriage contract, the plaintiff has the right to recover such damages as will compensate her for the non-fulfillment of the contract; she has the right to recover what would put her in as good a condition pecuniarily as she would have been in if the contract to marry had been fulfilled; she recovers for the disappointment of her reasonable expectations and worldly advantage of a marriage, which would give her a permanent home, an advantageous establishment: 2 Sedgwick on Damages, 8th ed., sec. 638; *Lawrence v. Cooke*, 56 Me. 187; 96 Am. Dec. 443.

Certainly, the anticipations and expectations of a happy future and a pleasant home in case of anticipated marriage would be greater, and the future would promise more, to one marrying a husband in full health and vigor, with a promise of long life and good health, and free from loathsome or hereditary diseases, liable to be transmitted to the children and fruits of the marriage, and the advantages to be gained by such a union would be prized higher than a union with one afflicted with an incurable and dreaded disease, having nothing to look forward to during the existence of the marital relations except to watch over and care for an unfortunate companion so sorely afflicted. The love for one who is afflicted may be mingled with pity and equally as strong, and even bind them together more closely, on account of such infirmities. In such case the



uppermost wish would undoubtedly be for the restoration of her companion to health, and why so, if not for the betterment of both her husband's and her own condition? As health is preferable to sickness, so a marriage to one in good health must be preferable to a marriage with an invalid, afflicted with a dreaded disease, with no hope of recovery, and nothing to look forward to except continual suffering by the one, and constant care on the part of the other.

In actions of this character, even the financial condition of the defendant may be considered in estimating damages to be assessed, and determining the advantage to have been gained by a consummation of the marriage.

It certainly is proper to show in mitigation of the damages that the defendant is afflicted with a dreaded incurable disease, which will not only cause the plaintiff constant care and anxiety, but shorten the term for which the marital relations may reasonably be expected to extend.

We are not without authority in support of the theory we have announced.

In 2 Sedgwick on Damages, 8th ed., sec. 641, it is stated that "it may be shown in mitigation that the defendant was affected with an incurable disease at the time of his breach of the promise," though it is further stated that this should depend upon prior knowledge of the fact by the plaintiff.

In this case it is not contended but that plaintiff had knowledge of the defendant's affliction. In the case of *Sprague v. Craig*, 51 Ill. 288, the same doctrine is laid down. The court in that case says: "All must know that a marriage with a healthy person, free from all disease, would, when all things else were equal, be more desirable than with a person with an incurable and offensive disease": *Allen v. Baker*, 86 N. C. 91; 41 Am. Rep. 444.

It follows from the conclusion we have reached that the court erred in sustaining an objection to this evidence.

There are numerous other errors alleged arising upon the trial of the cause, but as the judgment must be reversed on account of the errors in the rulings of the court in striking out the third paragraph of answer, and excluding questions 8 and 9, and the answers thereto in the deposition, we do not pass upon the other questions presented, as they will probably not arise on a retrial of the cause.

Judgment reversed, with instructions to the circuit court to proceed in accordance with this opinion.

**BREACH OF PROMISE OF MARRIAGE—MITIGATION OF DAMAGES.**—In an action for breach of promise of marriage, defendant may show, in mitigation of damages, that he was afflicted with an incurable disease at the time of the breach: *Sprague v. Craig*, 51 Ill. 288, cited in note to *Burnham v. Cornwell*, 63 Am. Dec. 548.

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## MISSISSINEWA MINING COMPANY v. PATTON.

[129 INDIANA, 472.]

**PLEADING—HUSBAND AND WIFE, JOINDER OF.**—A complaint in which the names of a husband and wife appear in the caption as plaintiffs, but the body of which states a cause of action in her favor alone, and does not mention him, may be regarded as good upon demurrer, by treating the mentioning of him in the caption as a mere surplusage.

**GAS COMPANY HAVING MAINS AND PIPES** laid in the streets of a city owes a duty to the owners of realty therein to use reasonable and ordinary care in so planting its mains and pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life or property.

**NEGLECT OF A GAS COMPANY** resulting in the escape of its gas from its pipes and mains into plaintiff's lot and his dwelling thereon, where it explodes, sets fire to, and destroys such dwelling and its contents, renders the company answerable to the plaintiff for the loss thus occasioned.

**PLEADING.**—A COMPLAINT CHARGING NEGLIGENCE IN GENERAL TERMS is good upon demurrer,

*C. E. Shipley*, for the appellant.

*W. H. H. Carroll and G. A. Dean*, for the appellees.

**MILLER, J.** The appellee Cora M. Patton brought this action against the appellant to recover damages alleged to have been caused by the negligence of the appellant.

In the caption of her complaint the name of her husband appears as a co-plaintiff, but in the body of the complaint no mention is made of him in any manner. The property alleged to have been destroyed is averred to be her property, and no attempt is made to state a joint cause of action. Under the circumstances, we must regard the name of the husband in the caption as surplusage, and hold that the complaint is not bad on demurrer for failure to present a good cause of action in favor of both plaintiffs, under the rule laid down in *Berkshire v. Shultz*, 25 Ind. 523, and cases following it. See also *Stewart v. Babbs*, 120 Ind. 568.

The complaint is in a single paragraph, and charges that the plaintiff was the owner of a dwelling-house and lot in the town of Marion; that the house was of the value of \$1,250, and that it contained personal property belonging to her of the value

of \$750; that the defendant was a corporation, organized under the laws of Indiana, being engaged in furnishing natural gas for fuel and light to the citizens of Marion, having and owning mains and pipes laid in the streets of said town, so carelessly laid and constructed said pipes and gas mains as to allow and permit such gas to flow and escape from its line of pipe through which such natural gas was being conducted over, upon, through, and into plaintiff's lot aforesaid, and into the dwelling aforesaid, and to accumulate therein in such quantity that the same came in contact with a lighted lamp therein, without the fault of plaintiffs, and exploded, and set fire to and destroyed the building and its contents, without any fault of the plaintiff, to her damage in the sum of two thousand dollars.

A demurrer was overruled to this complaint, and the ruling is assigned as error.

The first objection to the complaint pointed out in the brief of counsel is, that it does not show that the defendant owed the plaintiff any duty of which negligence of the defendant could be considered a breach.

The complaint is not very full or specific in its statement of the acts of negligence of which the defendant was guilty, or of the manner in which the plaintiff was injured, but it does show that the plaintiff owned a lot in the town, and that the defendant had its mains and pipes laid in the streets of the town. This, we think, is sufficient to show that the defendant owed a duty to the property owners of the town to use reasonable and ordinary care in so planting its pipes and mains as to prevent the escape of gas therefrom in such quantities as to become dangerous to life and property. This duty the defendant owed to the community in virtue of its occupancy of the public streets which belonged to the community, for its own special and extraordinary use in conducting an article which we know to be "in a high degree inflammable and explosive": *Jamieson v. Indiana etc. Co.*, 128 Ind. 555.

In *Sisk v. Crump*, 112 Ind. 504, 2 Am. St. Rep. 213, it is said: "There can, as a general rule, be no action, although there is negligence, unless the party guilty of negligence was under some duty to the person who sustains the injury. While it is essential that the defendant should be under some duty to the plaintiff, it is not essential that the duty should be directly owing to him as an individual. A defendant who owes a duty to the community owes it, as a general rule, to

every member of the community, and if any member suffers a special injury from a breach of that duty, an action will lie."

The liability of gas companies for damages occasioned by leakage from their pipes and mains has been frequently recognized by the courts: *Omslaer v. Philadelphia Co.*, 31 Fed. Rep. 354; *Emerson v. Lowell etc. Co.*, 3 Allen, 410.

It is also objected that the complaint does not show how the gas was conducted from the leak in the main to the house. As has been observed, the allegations of the complaint are not full and specific, and if a motion to make the pleading more specific, definite, and certain had been filed and overruled, as was the case in *Cincinnati etc. R. R. Co. v. Chester*, 57 Ind. 297, we would feel called upon to reverse the judgment; but it has many times been held that a complaint is good on demurrer which charges negligence in general terms: *Deller v. Hofferberth*, 127 Ind. 414; *Town of Rushville v. Adams*, 107 Ind. 475; 57 Am. Rep. 124; *Cleveland etc. R'y Co. v. Wyanant*, 100 Ind. 160; *Louisville etc. R. R. Co. v. Krimming*, 87 Ind. 351; *Cincinnati etc. R. R. Co. v. Chester*, 57 Ind. 297.

We cannot know that natural gas will not pass under the soil from a street main to a house in sufficient quantities to cause an explosion, and therefore cannot take notice that the complaint charges an impossibility.

We are also of the opinion that the complaint sufficiently alleges that the injury to the property of the plaintiff occurred without her fault or negligence.

Holding, as we do, that the complaint was not subject to demurrer, and no other question being discussed by counsel in their brief, the judgment is affirmed, with costs.

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**GAS COMPANIES—NEGLIGENCE.**—Gas companies are responsible for all damages resulting from breaking of their pipes, which were so negligently constructed as not to stand the uses to which they were put: Note to *Shepard v. Milwaukee Gas L. Co.*, 70 Am. Dec. 488, 489. For the liability of a gas company for the escape of gas, causing injury to health, see *Hunt v. Lowell Gas L. Co.*, 8 Allen, 169; 85 Am. Dec. 697, and note; or for the escape of gas, causing fire and explosions, see note to *Forney v. Geldmacher*, 42 Am. Rep. 391, 392; note to *Sauter v. New York etc. R. R. Co.*, 23 Am. Rep. 22; or for the escape of gas, causing other damages, see *Holly v. Boston G. Co.*, 8 Gray, 123; 69 Am. Dec. 233; *Butcher v. Providence G. Co.*, 12 R. I. 149; 34 Am. Rep. 626. In *Gray v. Boston G. L. Co.*, 114 Mass. 149, 19 Am. Rep. 324, where the owner of a building to the chimney of which a gas company has, without his permission, so affixed a wire as to render the chimney dangerous, was compelled to pay damages to one who was injured by the falling chimney, it was held that the owner had an action against the company for indemnity. In *Bartlett v. Boston G. L. Co.*, 117 Mass. 533, 19 Am. Rep. 421, it was de-

cided that the owner of a house cannot maintain an action against a gas company for an injury to his reversionary interest, caused by the negligence of the company in permitting gas to escape into the house, if the immediate cause of the injury was the explosion of the gas by the negligence of a tenant in possession of the house. In *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. 19, at the complaint of an adjoining land-owner, a gas company was held guilty of maintaining a nuisance *per se*, because it was manufacturing its gas from naphtha, which emitted disagreeable and offensive odors.

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### SHIDELEK v. STATE.

[129 INDIANA, 822.]

**JUDGMENT OF ACQUITTAL CANNOT BE COLLATERALLY ATTACKED AND TREATED AS VOID** on the ground that it was procured by bribing the prosecuting attorney, and thereby causing him to go to trial without making any effort to procure the attendance of witnesses by whom defendant's guilt could have been proved, and to submit the cause to the court sitting without a jury, and without offering any evidence except the statement of the accused and *ex parte* affidavits produced in his behalf.

*F. P. Foster, W. A. Kittinger, and L. M. Schwinn*, for the appellant.

*A. G. Smith, attorney-general, and A. C. Carver*, prosecuting attorney, for the state.

**MCBRIDE, J.** On the eighteenth day of April, 1890, an affidavit was made before the clerk of Madison County, charging the appellant with the crime of bigamy. The prosecuting attorney for that judicial circuit, on the same day, filed the affidavit in the clerk's office of that county, together with an information based thereon. The records of the Madison circuit court show that on the nineteenth day of May, 1890, the appellant was arraigned and entered a plea of not guilty, was tried by the court and acquitted, and that throughout the state was represented by the prosecuting attorney. September 22, 1890, he was indicted by the grand jury of that county for the same offense, and on being arraigned he filed a plea of former acquittal. A reply was filed, alleging that the former acquittal was procured by fraud. A demurrer to the reply was overruled; there was a plea of not guilty, and a trial which resulted in the conviction of the appellant, and he was sentenced to two years' imprisonment in the state prison.

The judgment of conviction can only be sustained by treating the judgment of acquittal in the first proceeding as absolutely void, and ignoring it. Can this be done?

Waiving any question as to the technical sufficiency of the reply, the facts, as the state claims to have established them by evidence on the trial, and which are relied upon as sufficient to justify the collateral attack on the judgment of acquittal, are substantially as follows: That, after the commencement of the first prosecution, persons acting in the interest of the appellant corrupted the prosecuting attorney by paying him a bribe of five hundred dollars to connive at appellant's escape from punishment; that although the fact of appellant's guilt was beyond controversy, and the evidence ample to secure a conviction, the witnesses for the state, who had arranged with the prosecutor to come, and who would have come at any time on notice, were not subpoenaed, or in any other way notified of the time of the trial, and were none of them present; that the prosecutor and the appellant went into court together without witnesses, a plea of not guilty was entered, and the case submitted to the court for trial without a jury; that the only evidence adduced was the statement of the accused and two *ex parte* affidavits produced by him; that this was all in accordance with said corrupt arrangement to secure the appellant's escape from punishment; and that it was upon such presentation of the case alone that the finding and judgment of acquittal were based.

It has been many times decided, and may be regarded as settled law, that if one procures himself to be prosecuted for an offense which he has committed, thinking to get off with slight punishment, or none, and to thus bar a prosecution in good faith by the state for the same offense, if the proceeding is really managed by himself, either directly or through the agency of another, and the state, while a party in name, is not so in fact, and has no actual agency in the matter, the judgment thus procured is void, and affords no protection: 1 Bishop's Crim. Law, sec. 1010; Archbold's Crim. Pr. & Pl. 352 (note by the American editor); *Watkins v. State*, 68 Ind. 427; 84 Am. Rep. 273; *Halloran v. State*, 80 Ind. 586; *Ice v. State*, 123 Ind. 590; *Gresley v. State*, 123 Ind. 72; *State v. Lowry*, 1 Swan, 34; *State v. Clenny*, 1 Head, 270; *State v. Colvin*, 11 Humph. 599; 54 Am. Dec. 58; *State v. Yarbrough*, 1 Hawks, 78; *Commonwealth v. Dascom*, 111 Mass. 404; *Commonwealth v. Alderman*, 4 Mass. 477; *State v. Little*, 1 N. H. 257; *State v. Wakefield*, 60 Vt. 618; *Commonwealth v. Jackson*, 2 Va. Cas. 501; *State v. Epps*, 4 Sneed, 551; *State v. Green*, 16 Iowa, 239; *State v. Atkinson*, 9 Humph. 677; *State v. Brown*, 16 Conn. 54;

*State v. Simpson*, 28 Minn. 66; 41 Am. Rep. 269; *McFarland v. State*, 68 Wis. 400; 60 Am. Rep. 867; *State v. Cole*, 48 Mo. 70.

While the judgments in such cases as those above cited are fraudulently procured, and are frequently said to be void because of the fraud practiced, it is apparent that a better reason for holding them void, and not binding upon the state, is, that the state is not a party to them.

The state can no more be bound by a judgment to which it is not a party than a citizen of the state can. If A and B engage in litigation, and during its pendency B corrupts A's attorney, and through him procures the rendition of a judgment unjust to A and inuring to B's advantage, although the judgment is thus tainted by fraud, if the court had jurisdiction of the subject-matter, and the proceedings are apparently fair and regular on their face, the judgment is not void, and cannot be attacked collaterally.

A judgment rendered under such circumstances is voidable, and the court rendering it will promptly set it aside on the fraud being shown: Freeman on Judgments, 99.

A court of equity will also give relief from a judgment thus procured: Black on Judgments, sec. 919; Freeman on Judgments, secs. 486 et seq.; Pomeroy's Eq. Jur., sec. 919.

The attack, however, must be direct, and not collateral: Black on Judgments, secs. 290 et seq., and cases cited.

If, however, B, without the knowledge or consent of A, and wholly without authority, personates him, or procures another to personate him, and prosecutes a suit in A's name, but actually in the interest of B, whereby a judgment is rendered to the disadvantage of A and advantage of B, it would be contrary to all principles of justice to hold that A was, in any manner or to any extent, bound by such judgment. Never having been a party to it, or having any notice or knowledge of the proceeding, he may treat it as a nullity, and may attack it collaterally, as the state was allowed to do in each of the several cases cited.

In speaking of such cases, Bishop well says: "He [the defendant] is, while thus holding his fate in his own hand, in no jeopardy. The plaintiff state is no party in fact, but only such in name; the judge is imposed upon indeed, yet in point of law adjudicates nothing; all is a mere puppet-show, and every wire moved by the defendant himself": 1 Bishop's Crim. Law, sec. 1010.

The supreme court of New Hampshire, in *State v. Little*, 1 N. H. 257, suggest a query, whether a judgment can ever be regarded as fraudulent and void when the state has been actually represented by its proper prosecuting officer.

We have been unable to find any case in the books presenting the peculiar features of the case at bar, where the courts have considered the sufficiency of a judgment thus procured as a defense to another prosecution for crime.

Here, the first prosecution was commenced regularly, and in good faith, and the state was represented throughout by its regularly authorized officer and agent, the prosecuting attorney. The charge is, that pending the prosecution the prosecuting attorney was corrupted, and paid to secure an acquittal instead of a conviction. So far as disclosed by the record, the prosecution proceeds with regularity throughout.

The arraignment, plea, and submission are regular, but the trial is a farce.

The distinction between such a case and those cited is at once apparent, and is very broad. While the baseness of an officer who will thus prostitute his office cannot be too severely condemned, and while he should receive prompt and severe punishment, our indignation should not be allowed to blind us to the principle involved. Our anxiety to rectify this wrong done, and punish the wrong-doer, should not lead us to violate established principles of law in our efforts to do so.

In the first prosecution the court had jurisdiction both of the subject-matter and of the parties. As above stated, the proceedings were regular up to and including the submission, and are not void. The steps taken were the usual, proper, and necessary steps in such a case, except that the defendant had the right to a jury trial, instead of a trial by the court. It is not pretended, however, that the judge was corrupt, or that his action was not characterized throughout by the highest and purest motives, and most sincere devotion to duty. When the cause was submitted for trial, jeopardy attached; so that, even if the extreme position were taken, and the trial regarded as a nullity, and the judgment absolutely void, we could expunge both from the record, and there would still remain a valid prosecution pending, awaiting trial.

Upon the other hand, if the former judgment, while voidable because of the fraud, is not void (which is our opinion), it is not open to collateral attack. In either view of the case, it follows that the court erred in ignoring the first prosecution,



and in allowing a new and independent prosecution to be maintained. Whatever rights the state has must be worked out in the original proceeding. The views we have expressed necessarily lead to a reversal.

It is unnecessary, and would be premature, for us to decide, at this time and in this case, what will be proper procedure for the state in the future conduct of this matter. We will only say that the question is not free from difficulty. It has, however, received consideration from those learned in the law, and some interesting and valuable suggestions will be found in 1 Bishop's Crim. Law, secs. 1008, 1009. See also *Rex v. Bear*, 2 Salk. 646; *State v. Tilghman*, 11 Ired. 513; *State v. Swepson*, 79 N. C. 632.

Judgment reversed.

#### ON PETITION FOR A REHEARING.

MCBRIDE, J. A petition for a rehearing by the state is based on an evident misapprehension of the scope and effect of the original opinion.

While it is true that a prosecution, which is in fact instituted and carried on to final judgment by or in the interest of a guilty person, to enable him to defeat justice and escape merited punishment (he in person, or by his instruments managing both sides), may be treated as void by the state, and ignored, on the ground that the state is not in fact in any sense a party to it, and therefore not bound by it, this is not true where the state is in fact a party to the proceeding. Where a prosecution is in fact regularly commenced by the prosecuting attorney, and is thereafter carried to final judgment, the state being represented throughout by its sworn officer, the prosecuting attorney, such judgment is not void because the prosecutor was corrupted during the pendency of the proceeding. The state is a party to such judgment. The conduct of its unworthy representative conspiring with the guilty party may render it voidable, but it cannot be ignored.

Petition for rehearing overruled.

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JUDGMENTS—COLLATERAL ATTACK. — A collateral attack on a judgment or order cannot be successful unless such judgment or order is void: *Dyer v. Leach*, 91 Cal. 191; 25 Am. St. Rep. 171, and note; *Boyd v. Ellis*, 109 Mo. 394; *Carter v. Rountree*, 109 N. C. 29.

## ANDERSON v. ANDERSON.

[129 INDIANA, 572.]

**EXECUTION OR JUDICIAL SALE OF PROPERTY TO SATISFY A JUDGMENT AND DECREE EXHAUSTS THE POWER TO SELL SUCH PROPERTY thereunder,** and a judgment creditor cannot, after the redemption by a junior encumbrancer, resell it to enforce payment of the unsatisfied part of the judgment. When the junior encumbrancer redeems, he does so for his own benefit, and not for that of the creditor upon whose judgment the sale was made.

**CONSTITUTIONAL LAW. — STATUTES CREATING A RIGHT TO REDEMPTION MAY BE ALTERED.** — This right is the creature of the statute, relating to the remedy, and is not so essential to a contract right as to be entirely beyond legislative control.

*S. H. Doyal and P. W. Gard*, for the appellant.

*J. Claybaugh and R. P. Davidson*, for the appellees.

ELLIOTT, J. On the third day of January, 1876, Jeremiah Anderson executed a promissory note to the appellant, and to secure payment of the note, Jeremiah and his wife, Sarah, executed a mortgage to the appellant. Suit was brought on the note and mortgage, a judgment for \$7,178 was recovered against Jeremiah, and a decree foreclosing the mortgage was rendered. On this judgment and decree the mortgaged land was sold for three thousand dollars, and subsequently other property was sold for fifteen hundred dollars. The avails of the sales under the judgment were not sufficient to pay the judgment, but left the sum of \$3,020 unpaid. In November, 1887, Sarah Anderson recovered judgment against Jeremiah Anderson for \$1,516. On the twentieth day of January, 1888, she redeemed the land described in the mortgage executed to the appellant. The appellant's position is, that he is entitled to have the land sold to himself and redeemed by Sarah Anderson again sold to satisfy the \$3,020 remaining unpaid upon his judgment against Jeremiah Anderson.

Counsel argue that the lien of the mortgage was not merged; and that the lien still exists, notwithstanding the sale, and refer us to the case of *Teal v. Hinchman*, 69 Ind. 379. It is true that the lien of a mortgage is not always merged in a judgment, and that equity will preserve the lien when necessary to prevent injustice: *Evansville etc. Co. v. State*, 73 Ind. 219; 38 Am. Rep. 129; *Pence v. Armstrong*, 95 Ind. 191 (207).

But the doctrine stated does not rule such a case as this. The principle which controls the present case may be thus

stated: The sale on a judgment or decree exhausts it as to the property sold, and the judgment creditor cannot, after redemption by a junior encumbrancer, resell the land to enforce payment of an unsatisfied part of his judgment: *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381; 21 Am. St. Rep. 231; *Green v. Stobo*, 118 Ind. 332; *Hervey v. Krost*, 116 Ind. 268; *Simpson v. Castle*, 52 Cal. 644; *People v. Easton*, 2 Wend. 298; *Russell v. Allen*, 10 Paige, 249; *Clayton v. Ellis*, 50 Iowa, 590.

The object of the law is to compel creditors to bid a fair and adequate price for the debtor's property, and to prevent them from bidding a small sum, and in the event of a redemption, again subject the property to sale. The policy of the law — and it is a sound and just one — is to prohibit the creditor from selling the property more than once for his own benefit, and to secure a just and fair price for the property in the first instance. Another purpose is to discourage the practice of creating costs by making repeated sales on the same judgment. The case of *Greene v. Doane*, 57 Ind. 186, has been disapproved in many decisions and by the text-writers generally. Our own decisions have emphatically asserted that even if that case was well decided under the statute then in force (which is questioned in some of the cases), it does not express the law as it now exists.

It is a mistake to suppose that the law intends that the redemption by a junior encumbrancer shall be for the benefit of the creditor upon whose judgment the land was sold; for, on the contrary, the right of redemption is created for the benefit of the debtor and junior encumbrancers. When a junior encumbrancer redeems, he does so, in contemplation of law, for his own benefit, and not for that of the creditor upon whose judgment the sale was made: *Porter v. Pittsburgh etc. Co.*, 122 U. S. 267.

It is insisted by the appellant's counsel that the case is governed by the statute enacted prior to 1881, and that the decision in *Greene v. Doane*, 57 Ind. 186, controls. But this position is untenable. Even if it were conceded that the doctrine of *Greene v. Doane*, 57 Ind. 186, is sound, it would not follow that it governs here. It has been directly decided by the supreme court of the United States, and impliedly by this court, that statutes creating a right to redeem may be altered. The right to redeem is solely the creature of statute; it relates to the remedy, and is not, as it is held, so essentially and intrinsically a contract right as to be entirely

beyond legislative control: *Connecticut etc. Ins. Co. v. Cushman*, 108 U. S. 51; *Davis v. Rupe*, 114 Ind. 588; *Hervey v. Krost*, 116 Ind. 268; *Parker v. Dacres*, 130 U. S. 43; *Freeman on Executions*, sec. 314.

Judgment affirmed.

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**STATUTES RESPECTING RIGHT TO REDEM FROM EXECUTION SALES** may be altered: Note to *Scobey v. Gibson*, 79 Am. Dec. 495, 496; note to *Geaken v. Stonington*, 10 Am. Dec. 138; *Oullahan v. Sweeney*, 79 Cal. 537; 12 Am. St. Rep. 172; *Gage v. Stewart*, 127 Ill. 207; 11 Am. St. Rep. 116. See also *Richman v. Supervisors of Muscatine County*, 77 Iowa, 513; 14 Am. St. Rep. 308, and note. Remedial statutes are not unconstitutional on the ground that they may impair the obligations of contracts: *Judkins v. Taffe*, 21 Or. 89; *Breams v. Negrotto*, 43 La. Ann. 426; *Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694, and note.

**EXECUTION SALES.** — After an execution becomes *functus officio*, a sale thereunder conveys no title: *Knight v. Morrison*, 79 Ga. 55; 11 Am. St. Rep. 406.

**EXECUTION OR FORECLOSURE SALE — REDEMPTION.** — For a thorough discussion as to who may redeem from an execution or foreclosure sale, see note to *Horn v. Indianapolis Nat. Bank*, 21 Am. St. Rep. 243-249.

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## HAYNES v. NOWLIN.

[129 INDIANA, 581.]

**A MARRIED WOMAN MAY SUSTAIN AN ACTION AGAINST ONE WHO WRONGFULLY ENTICES HER HUSBAND** from her and alienates his affections, if, under the statutes of the state under which she prosecutes her action, she is given power to sue for personal wrongs without joining her husband.

*W. S. Holman, W. S. Holman, Jr., H. D. McMullen, and W. R. Johnston*, for the appellant.

*G. M. Roberts, C. W. Stapp, J. K. Thompson, M. J. Givan, and N. S. Givan*, for the appellee.

**ELLIOTT, C. J.** The question which the record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her and alienates his affections?

It was the boast of the common law, that "there is no right without a remedy," and in the main, this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately pre-

presented for judicial consideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support, and affections of her husband. The fiction that the *baron* and *feme* were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support, but, on the contrary, denied it, by holding that the wife might have a right of action against the wrong-doer who took her husband from her. To these cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrong-doer who deprives her of the society, support, and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law, and generally very justly, is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many and such comprehensive rights to the *baron*, and so few and such narrow ones to the *feme*, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid of statutory enactments, the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress.

The doctrine that the wife could not maintain an action

against one who deprived her of her husband violates the old maxim, that reason is the life of the law, for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the strong may maintain an action, the greater the reason why the weak may do so. If the *baron* may recover from one who entices away the *feme*, surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same but the degree is not, for the reason intensifies in power when invoked by the injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration: *Bennett v. Bennett*, 116 N. Y. 584; *Lynch v. Knight*, 9 H. L. Cas. 577; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 293; *Jaynes v. Jaynes*, 39 Hun, 40; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258.

The decisions to which we have referred, and the authorities they adduce, prove, beyond debate, that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest, and upon reason and principle, she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that she and her husband were one, for from this fiction came the stiff, unreasonable rule, that in all actions she must join her husband. Equity, however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus — adopting the chancery doctrine and abrogating that of the common law — broke down the only position upon which it could, with the slightest plausibility, be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away

her husband. It was never asserted by the better considered cases, nor by the abler text-writers, that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was, not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right. When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. We know that in the case of *Logan v. Logan*, 77 Ind. 558, a different doctrine was declared, but that decision was by a divided court, and the question was not fully considered. Not a single authority was there adduced, nor is there any consistent line of reasoning. We should be strongly inclined to deny the soundness of that decision if it were necessary to do so, but it is not necessary that we should overrule it, for since the cause of action there declared invalid arose, radical changes have been made by statute. The rights, as well as the obligations, of married women, have been greatly enlarged. In many cases it has been affirmed of married women that under the present statute "ability is the rule and disability the exception": *Rosa v. Prather*, 103 Ind. 191; *Arnold v. Engleman*, 103 Ind. 512 (514); *McLead v. Aetna L. Ins. Co.*, 107 Ind. 394; *City of Indianapolis v. Patterson*, 112 Ind. 344; *Bennett v. Mattingly*, 110 Ind. 197; *Strong v. Makeever*, 102 Ind. 578; *Lane v. Schlemmer*, 114 Ind. 296 (301); 5 Am. St. Rep. 621; *Phelps v. Smith*, 116 Ind. 387 (402); *Young v. McFadden*, 125 Ind. 254; *Müller v. Shields*, 124 Ind. 166.

It seems to us very clear that in view of the facts that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her.

Every radical and express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this doctrine that when the stat-

utes gave a married woman the right to sue alone, and changed her *status* so as to invest her with the general property rights of a citizen, and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society, and affections of the husband.

In adjudging, as we do, that this action can be maintained, we believe that we build on solid principle, and we know that we are sustained by able courts. The authorities already adduced give our conclusion support, and to them we add: *Seaver v. Adams*, N. H., March 14, 1890; 19 Atl. Rep. 776; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397; *Postlewaite v. Postlewaite*, 1 Ind. App. 473. See also *Duffies v. Duffies*, 76 Wis. 374; 20 Am. St. Rep. 79. The views of the text-writers are in harmony with our conclusion. Mr. Bigelow says: "To entice away or to corrupt the mind and affections of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife": Bigelow on Torts, 153. Judge Cooley says: "We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her": Cooley on Torts, 228, note. Mr. Bishop clearly and strongly states the rule. He says: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society, and especially also of his protection and support, inflicts on her a wrong in its nature actionable. We have seen that by the common-law rules, which forbid the wife to sue for a tort except by joining the husband as co-plaintiff, she is practically without an available remedy. But under the modern statutes as they are shaped in many of our states, she can hold property at law, bring suits to secure it, and maintain actions of tort, in her own name, and with no interference from her husband. So that where a statute of this sort prevails, she has her action against the seducer of the husband, who has thus wrongfully deprived her of his society and care": 1 Bishop on Marriage and Divorce, sec. 1358.

Judgment reversed.

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**WIFE'S RIGHT TO SUE FOR ALIENATING AFFECTIONS OF HER HUSBAND.** — Doubtless the injury which results to a wife from the alienation of her husband's affections, and the consequent inducing him to disregard his marital obligations, is the same in character, if not in degree, as the injury which re-



sults to a husband when a like wrong is perpetrated upon him with respect to his wife. That a husband may sustain an action for his injury is indisputable, and by the rules of the common law it is perhaps equally indisputable that a wife, for a wrong of this character, is without means of legal redress, for the reason that she cannot sustain an action for personal injuries without joining her husband as a co-plaintiff: *Bennett v. Bennett*, 116 N. Y. 584. That the injury resulting to a wife is actionable where she is not by law deprived of the right to sue for it, we believe is clear upon principle. "The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute, but from the flexibility of the common law, and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have the right of action for the loss of her society, unless she also has a right of action for the loss of his society? Does not the principle, that 'the law will never suffer an injury and a damage without a remedy,' apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her"; *Bennett v. Bennett*, 116 N. Y. 584.

Yielding to reasoning such as that just quoted, the majority of American courts, in states where statutes have been enacted giving to married women the right to sue for personal injuries, have maintained their right to recover damages for the alienation of their husbands' affections, and the consequent loss of his society, assistance, and support: *Bassett v. Bassett*, 20 Ill. App. 543; *Warren v. Warren*, 89 Mich. 123; *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258; note to *Shaddock v. Clifton*, 94 Am. Dec. 593; *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397; *Seaver v. Adams*, N. H., March, 1890; *Bennett v. Bennett*, 116 N. Y. 584. At the present time, we believe there are but two states whose courts dissent from this view: *Dos v. Bee*, 82 Me. 503; 17 Am. St. Rep. 499; *Duffie v. Duffie*, 76 Wis. 374; 20 Am. St. Rep. 79. With respect to one of them (Maine), the decision upon the subject is so meager that we are not able to determine whether it was founded upon the common-law rule denying the right of a wife to sue for personal injuries, or upon general considerations of the impolicy of permitting her to maintain an action to redress a wrong of this nature.

# CASES

IN THE

# SUPREME COURT

OF

# MARYLAND.

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## CHESAPEAKE AND POTOMAC TELEPHONE COMPANY v. MACKENZIE.

[74 MARYLAND, 36.]

**TELEPHONE COMPANY — ERECTION OF POLE IN STREET — INJUNCTION.** — A declaration alleging that plaintiff is possessed of a valuable warehouse, and that defendant, a telephone company, without his authority or consent, and without making or offering to make compensation therefor, has planted a large and unsightly pole in front of such warehouse, which obstructs and prevents the comfortable, reasonable, and beneficial enjoyment and use of such premises, without alleging the mode and manner of such obstruction and interference, states a cause of action, and may properly include a prayer for injunction.

**PLEADING — DEMURRER — INJUNCTION.** — The question as to whether the additional relief asked by way of injunction is appropriate or not, under the facts disclosed by the declaration, must be raised by special demurrer, and a general demurrer, whether interposed directly to the declaration or to some subsequent pleading, will not be sufficient to raise that question.

**TELEPHONE COMPANY — AUTHORITY TO PLANT POLES CANNOT BE ENLARGED BY ORDINANCE.** — The planting of a telegraph or telephone pole in a highway or street is not a public nuisance when sanctioned by statute; but the right to so plant such pole is derived from and depends solely on such statute, and cannot be enlarged by municipal ordinance.

**TELEPHONE COMPANY — PLANTING POLE IN STREET — ADDITIONAL SERVITUDE.** — When the fee in the bed of a street or highway is in the abutting land-owner, the planting of a telegraph or telephone pole therein is an additional servitude imposed upon the land, for which such owner is entitled to compensation of which he cannot be deprived by statute.

**TELEPHONE COMPANY — PLANTING POLE IN STREET — DAMAGES FOR SPECIAL INJURY — INJUNCTION.** — When land has been acquired for streets by the exercise of the right of eminent domain, and has been appropriated by a corporation for the planting of telegraph or telephone poles, under legislative and municipal sanction, so as to unreasonably abridge

the right of adjacent lot-owners to the use of the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation, and may maintain an action against such corporation for the recovery of the immediate and direct damages sustained by them. In an appropriate case an injunction may be procured to prevent a continuance of the interference with the use of the street.

**TELEPHONE COMPANY — PLANTING POLE IN STREET — MEASURE OF DAMAGES.** — In an action by an abutting owner on a street or highway to recover of a telephone company for placing a pole in front of his premises, the measure of damages is not what a particular individual would be willing to charge for having the pole put up or remain, nor the amount some other person might consider the rental value was depreciated for the purpose of his business; but when plaintiff's land is not actually taken nor his soil invaded, the measure of damages is the extent to which the rental or usable value of the particular property has been diminished by the erection of the pole, or the difference in the value of the property before the erection of the pole and afterwards, if the depreciation has been caused by its erection.

**PLEADINGS — INSTRUCTION.** — When a complaint alleges the possession by plaintiff of a warehouse, and an interference with his use and enjoyment thereof by the erection of a telephone pole, without alleging a reversionary interest in the warehouse, and the proof shows that the premises were in the possession of a tenant of the plaintiff, a prayer for an instruction that plaintiff is not entitled to recover damages for the erection of the pole, without making any reference to the pleadings, is properly refused, if the evidence is sufficient to sustain any action by plaintiff as the owner of the reversion in the warehouse.

*Charles J. M. Gwinn*, for the appellant.

*George Norbury Mackenzie and John V. L. Findlay*, for the appellee.

**McSHERRY, J.** The declaration in this case alleges "that the plaintiff is possessed of a lot of ground, with the improvements thereon, being valuable warehouse property, known as No. 22 South Charles Street, and while so possessed the defendant, without her authority or consent, and without making or offering to make compensation therefor, planted a large and unsightly pole in the footway in front of said premises, which obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of the said premises, and though repeatedly notified to remove the said pole, refuses so to do, although a reasonable time for the removal of the same has elapsed," etc. There is added an application for an injunction under section 117 of article 75 of the code. The defendant filed three pleas. The second was the plea of not guilty, and the first and third are as follows, viz.: "That the defendant, at the time of the alleged trespass, was duly incorporated as a telephone company under the laws of the state of Maryland, and

was entitled as a corporation so formed, in the prosecution of its business, and for the purpose thereof, to erect and maintain the pole upon the footway of South Charles Street, in the city of Baltimore, in front of the warehouse of the plaintiff, complained of in the declaration of the plaintiff, without making, or offering to make, compensation therefor to the plaintiff; and that the alleged trespass complained of in the declaration of the plaintiff was a use by the defendant of its said right"; 3. "That the plaintiff ought not further to have or maintain her aforesaid action against it, because it says that by a certain ordinance of the mayor and city council of Baltimore, approved on the ninth day of May in the year 1889, and since the institution of the suit in this cause, it, the said defendant, was and is authorized to maintain its said pole in and upon the footway of South Charles Street, in the city of Baltimore, in front of the warehouse of the plaintiff complained of in the declaration of the plaintiff, for the period of two years after the said date of the approval of said ordinance, and so long as said pole is necessary to be maintained by the defendant for the purpose of making distribution of and forming connections between any wire or wires forming part of the underground wire cables authorized by said ordinance to be laid within the limits of the city of Baltimore." To these pleas,—the first and third,—the plaintiff demurred, and the court of common pleas sustained the demurrer. It is insisted by the appellant, the defendant below, that as the demurrer mounted to the first fault in the pleading, the court ought to have ruled the declaration to be bad, and its failure to do so is assigned as the first error for review on this appeal. We are, of course, confined to the declaration itself in determining its legal sufficiency. Neither the averments of the pleas nor the evidence in the record can be looked to or considered in passing upon that question. The forms of pleading have been materially changed by legislation, and since the adoption of the simplification act, which is substantially incorporated in the code, nothing more is needed in a declaration than a plain statement of the facts which are relied on to sustain a recovery: Code, art. 75, sec. 3. Whilst it does not appear from the *narr.* whether the footway in front of the warehouse premises is a public thoroughfare or not, or whether the title to it is in the plaintiff, it is distinctly alleged that the plaintiff is possessed of a valuable warehouse property, and that without her authority or consent the defendant planted a large and unsightly pole in front

thereof, which obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of the premises. As framed, the *narr.* alleges a direct interference by the defendant with the use and enjoyment by the plaintiff of her property. And it further alleges that this interference was without her authority or consent. If these facts be true, why do they not furnish a ground of action? That the appellee had the right to the comfortable, reasonable, and beneficial use and enjoyment of her property is undeniably true, unless the contrary be averred and shown. That the unauthorized obstruction of or interference with that right is a wrong which will support an action for damages cannot be open to controversy. Though it might have been more artificial pleading had the mode and manner of the obstruction and interference been set forth in the declaration, they were not necessarily elements of the injury complained of, but rather matters of proof, showing the character and extent of that injury. The *narr.*, on its face, does not declare for an obstruction of the footway or the street; and it was, therefore, not necessary to allege that, by reason of the plaintiff's possession of the premises, she was entitled to the way, in the exercise of which she was interfered with by the defendant. The averment is, that the pole thus planted in the footway obstructed, not the footway, but the plaintiff's use and enjoyment of the property in her possession,—her warehouse; and that averment, it seems to us, is, under the code, sufficient, if proved, to sustain an action. This conclusion is founded, of course, exclusively and solely upon the face of the declaration, without any reference to other parts of the record.

It has been further insisted, as a reason for holding the declaration bad, that the prayer for an injunction was improperly included therein, because, so it is alleged, the facts disclosed by the *narr.* do not justify the application of that remedy. Sections 116 to and including 128 of article 75 of the code make provision for the issuing of writs of injunction and *mandamus* by courts of law in certain actions instituted in these courts. Under these provisions, the prayer for an injunction to restrain the appellant from continuing the pole in its place, and to order the removal thereof, was added to the declaration. By section 119 it is provided that "the defendant may demur to so much of the plaintiff's declaration as claims such writ, and such demurrer shall raise the question whether the facts stated as the ground of such claim disclose

any such legal duty as that so sought to be enforced, but shall be subject to all rules governing general demurrers at law, both as to the proceedings thereon and thereafter." Now, it was argued that the general demurrer filed by the plaintiff to the defendant's first and third pleas mounted, according to the well-settled rule, not only to the declaration proper, but also to the prayer for relief by injunction. Whether this view is correct or not depends upon the meaning of the section from which we have just quoted. The remedy by injunction from a court of law is a purely statutory remedy. The mode to be pursued for obtaining it is defined and pointed out in the code. If the facts stated in the declaration do not disclose a case which will justify the issuing of such a writ, the defendant may demur "to so much of the plaintiff's declaration as claims such writ," and the statute expressly declares what question that demurrer shall raise. It is consequently a special demurrer that is thus provided for, notwithstanding the antecedent provision in section 6 of the same article that no special demurrer shall be allowed in civil cases. Can a general demurrer be treated as equivalent to or the same as this special demurrer? If so, then the general demurrer to the pleas would reach any defect in the prayer for injunctive relief in the *narr*. Inasmuch as the demurrer prescribed by the statute is a special demurrer, it seems to us quite apparent that a general demurrer would not answer, if interposed by the defendant directly to the *narr*. Of course, therefore, a general demurrer interposed by the plaintiff to pleas of the defendant could not serve any other or wider purpose, or raise any other question, than a general demurrer filed by the defendant to the declaration would itself have done, unless the clause declaring that the special demurrer "shall be subject to all rules governing general demurrers at law, both as to the proceedings thereon and thereafter," was intended to convert the special into a general demurrer. No such intention is manifested by the language used as we read it. The special demurrer is declared to be subject to the rules governing general demurrers, only so far as respects the proceedings on a general demurrer, and the proceedings after a ruling is made thereon. In other words, when a special demurrer under this statute is interposed to the declaration, the same proceedings shall be had as are provided by the rules of law with reference to proceedings on and after a general demurrer. That is to say, the right to amend if the demurrer be sustained, and the

right to plead over if it be overruled, are preserved, precisely as in the case of similar rulings on a general demurrer. This, and this only, is the effect of the clause just quoted from the code. Our interpretation of the statute, then, is this: If a defendant desires to raise a question as to whether the additional relief by way of injunction or *mandamus* is appropriate under the facts disclosed by the declaration, he must do so by special demurrer, and a general demurrer, whether interposed directly to the declaration or to some subsequent pleading, will not be sufficient to raise that question.

We now come to the consideration of the ruling of the court sustaining the demurrer to the first and third pleas filed by the defendant. These pleas present some of the principal questions discussed in the argument at the bar. They rely, as a defense to the action, upon an authority which the appellant claims to have under the code, and under an ordinance of the mayor and city council of Baltimore, to plant in its present position the pole complained of, without making or offering to make compensation to the appellee. By sections 224 and 232 of article 23 of the code, telegraph and telephone companies, incorporated under the general corporation law of this state, are empowered to construct their lines along and upon any postal roads and postal routes, roads, streets, and highways, provided their fixtures, posts, and wires do not "interfere with the convenience of any land-owner more than is unavoidable." It is expressly provided in section 224 that "the said corporation shall be responsible for any damages which any person or corporation may sustain by the erection, continuance, and use of such fixtures." It is further provided, that in any action brought for the recovery of damages, the company may elect to have included the damages for allowing the said fixtures permanently to continue. The following proviso is then added: "Provided, that no person or body politic shall be entitled to sue for or recover damages, as aforesaid, until the said corporation, after due notice, shall have failed or refused to remove, in reasonable time, the fixtures complained of." It is not necessary to allude to the ordinance of the mayor and city council of Baltimore, for the reason that whatever authority the appellant possesses, in reference to the planting and maintenance of the pole in question, must be derived from and depend on the act of assembly. The ordinance could not enlarge that authority. To what extent, then, does the statute justify the action of the appellant, and

protect it from liability? The planting of a telegraph or telephone pole in a highway or street is not a public nuisance, because the legislature has declared that it shall not be; but the general assembly was powerless to subject the reversionary interest in the bed of such highway or street to an additional servitude, without making appropriate provision for just compensation to the owner: *Phipps v. Western Maryland R. R. Co.*, 66 Md. 319; *American Telephone and Telegraph Co. v. Pearce*, 71 Md. 535. In the case last referred to, this court held that planting telephone poles upon the right of way acquired by a railroad company was, when the telephones were used for purposes other than the operation of the road, an additional servitude imposed upon the soil, which entitled the owner of the reversion to an injunction against the telephone company to restrain it from so appropriating the land until compensation, to be ascertained in the method prescribed in section 40, article 3, of the constitution of the state, should be first paid or tendered. And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee: *Thomas v. Ford*, 63 Md. 346; 52 Am. Rep. 513. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful unless the right to do so is acquired by contract or condemnation: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908; *Broome v. New York and New Jersey Tel. Co.*, 42 N. J. Eq. 141.

The use to which streets in a town or city may be lawfully put are greater and more numerous than in the case of an ordinary road or highway in the country. With reference to the latter, as we have just observed, all the public acquires is the easement of passage and its incidents; and hence the owner of the soil parts with this use only, retaining the soil, and by virtue of this ownership is entitled, except for the purposes of repair, to the earth, timber, and grass growing thereon, and to all minerals, quarries, and springs below the surface. But with respect to streets in populous places, the public convenience requires more than the mere right of way over and upon them. They may need to be graded, and therefore the municipal authorities may not only change the surface, but cut down trees, dig up the earth, and may use it in improving the street, and may make culverts, drains, and sewers upon or under the surface. Pipes may also be laid under the sur-



face when required by the various agencies adopted in civilized life, such as water, gas, electricity, steam, and other things capable of that mode of distribution: 2 Dillon on Municipal Corporations, secs. 656 a, 688. Subject to these and other like rights of the municipality and the public to the use of a street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation for additional servitudes placed thereon that the owner of the bed of a highway in the country is entitled to. If, then, the fee in the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land, for which she could claim compensation, and the act of assembly could not deprive her of it. But in many instances the beds of the streets are owned in fee by the city, and in others the fee is vested in the original owners of the land or their heirs, and does not belong to the owners of the lots abutting on the streets. If the fee be in the city, or in some third person, then, — 1. What are the rights, in a case like this, of the owner of a lot abutting on the street? and 2. How are those rights affected by the provisions of the code relied on in the pleas? There is some diversity of opinion in the decided cases upon the first of these questions, but all agree in going at least this far, — and we are not required to go any farther in deciding this appeal, — that where the fee or legal title has passed from the original proprietor, as in cases where the land has been acquired for streets by the exercise of the right of eminent domain, the adjoining owner cannot maintain an action for injuries to the soil, or ejectment, but he nevertheless has a remedy for any special injury to his rights by the unauthorized acts of others. Hence, if an appropriation of a street by a person or body corporate, even under legislative and municipal sanction, unreasonably abridges the right of adjacent lot-owners to use the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation; and an action will lie against the person or corporation guilty of usurping such unreasonable and exclusive use for the recovery of such immediate and direct damages as the abutter may sustain: *Elizabeth etc. R. R. Co. v. Combs*, 10 Bush, 382; 19 Am. Rep. 67; *Schurmeier v. St. Paul etc. R. R. Co.*, 10 Minn. 82; 88 Am. Dec. 59; affirmed in 7 Wall. 272; Cooley on Constitutional Limitations, 556. Indeed, this is merely the application of familiar principles of the common law.

Whether, then, the appellee be the owner of the reversion in

the bed of the street, or only entitled to the rights of an abutter on the street, the pleas demurred to set forth no facts which furnish a defense to the action; because, as against the owner of the fee, the provisions of the code relied on in the pleas are inoperative for the reasons we have given; and as respects the owner of a lot abutting on the street, they expressly reserve, and they could not have validly denied, his right to recover for such direct and immediate injuries as he might sustain by the construction of a line of telegraph and telephones upon a public street or thoroughfare. Whether the damages to be recovered shall be upon the basis of the permanent occupation of the premises, or only for the period up to the bringing of the suit, is left to the election of the company; and it would necessarily follow, if the recovery should be limited at its instance to the latter period, that subsequent suits could be brought; and in an appropriate case an injunction could be procured to prevent a continuance of the interference. It results, then, that neither the rights of the owner of the reversion nor those of the abutter upon a street are abridged by the statute, and that, in so far as that statute attempts or was intended to effect that result, it is nugatory and inoperative. As a consequence, whatever rights the appellant did acquire under the statute are subordinate to the property rights of the appellee, and the pleas which rely upon the statute and the ordinance as giving the appellant authority to plant and maintain its posts and wires, without regard to the injury caused the appellee, were very properly declared to be no answer to the action.

The remaining questions involved are presented by the exceptions taken to the admission of evidence, and to the rulings of the court on the prayers for instructions to the jury. There are twelve of these exceptions. Eleven of them relate to the admissibility of evidence adduced by the appellee upon the question of damages, and the twelfth to the granting of the appellee's second prayer, and the rejection of the appellant's first.

It is not necessary to discuss separately the exceptions which relate to the measure of damages, for they all present the same question, substantially. The appellee proved by several witnesses the amount which, if they owned the property, they would, in their opinion, give not to have the pole placed where it is, and the amount they would give to have it taken away. She further proved by another witness that,

with the pole removed, he would be willing to pay more rent for the property than he would with the pole standing where it is; and by still another, that for the purposes of his business he would make a difference of five hundred dollars in the rental value of the premises. None of this testimony was admissible. The true measure of damages in such a case as this is not what a particular individual would be willing to charge for having the pole put up or remain, nor the amount some other person might consider the rental value was depreciated for the purposes of his business; but where the land of the plaintiff is not taken nor his soil actually invaded, the measure of damages, as adjudged in many cases, is either,—1. The extent to which the rental or usable value of the particular property has been diminished by the trespass or injury complained of: *Baltimore etc. R. R. Co. v. Boyd*, 67 Md. 41; 1 Am. St. Rep. 362; *Wood v. State*, 66 Md. 61; or 2. The difference in the value of the property before the construction of the pole and its value afterwards, if the depreciation in value has been caused by the erection and maintenance of the pole: *Shepherd v. Baltimore etc. R. R. Co.*, 130 U. S. 426.

Lastly, with regard to the prayers. There was no error in rejecting the first prayer of the appellant, because the prayer failed to refer or point to the pleadings. The correctness of this ruling must depend, not upon the state of the pleadings, but upon the evidence to which alone the prayer makes reference: *Giles v. Fauntleroy*, 13 Md. 136. The declaration counts upon a possession, by the plaintiff, of the warehouse, and an interference with her use and enjoyment thereof, and the proof shows that the premises were in the occupancy and possession of a tenant of the plaintiff, and not in the possession of the plaintiff, who was only entitled to the reversion. For an injury to the possession, the tenant in possession alone can sue, though if the same injury affects the reversion, the reversioner may sue in case: 1 Ch. Pl. 63. The evidence in the record shows that the appellee does not own the reversion in the bed of Charles Street; and it further shows that no damage was done to the plaintiff's possession, because she was not in possession. The *narr.* does not declare for an injury to the reversionary interest in the warehouse, as it might have done, and the prayer did not point to the pleadings; but if the evidence adduced was sufficient to sustain any action by the appellee, it would have been error in the court to grant a prayer declaring that there was no evidence that the plaintiff had sustained

damage by the erection of the pole, unless the prayer had made reference to the pleadings.

There is nothing in the appellee's granted prayer of which the appellant can complain. Taken in connection with the appellant's third instruction, the recovery was limited to the time that suit was brought.

For the error in admitting the evidence objected to in the first eleven exceptions, the judgment must be reversed, and a new trial must be awarded.

**Telegraph and Telephone Poles and Wires in Streets and Highways and Across Private Property.\***

*Poles, Erection of, without Authority.*—The principle is universally recognized, that in the absence of legislative or municipal sanction, the erection of telegraph or telephone poles, and the stringing of wires thereon, in the public streets or highways is a public nuisance, which may be abated at the instance of an abutting land-owner, if the poles obstruct or prevent the free passage of carriages, horses, or foot-passengers: *Regina v. United Kingdom Electric Tel. Co.*, 31 L. J. M. C. 156; 2 Best & S. 647; 9 Cox C. C. 174.

*Legislative Power to Authorize Use of Highways.*—Although the legislature has authority, in the exercise of the police power of the state, to determine that the erection of poles and the stringing of wires of telegraph or telephone corporations is a public use, not inconsistent with the use of the street for street purposes, yet the interesting, perplexing, and doubtful proposition is involved, as to whether the legislature may authorize such use of the street or highway without providing for compensation to the abutting land-owner. In other words, the question is necessarily involved as to whether or not, when the public has acquired an easement in land for a street or highway, by taking it under the right of eminent domain, or by dedication, prescription, or grant, a new use and an additional servitude is to be deemed as imposed by appropriating the street or highway, under legislative sanction, for the use of a line of electric telegraph or telephone, by the erection of poles and wires above the surface of the ground, so that the owner of an abutting estate, or of the soil to the center of the street, is entitled to further compensation therefor, or is such use included by implication in the purposes for which the land was condemned, dedicated, or granted.

*Compensation, whether Legislature may Deprive Land-owner of Right to.*—The adjudged cases upon this subject present an irreconcilable conflict of authority, and seem to be about equally divided. The topic is new, and although it may not be safe to hazard an opinion as to how it will be finally settled, still it may be stated that the later cases, and it seems the weight of authority, sustain the doctrine, without qualification, that a telegraph or telephone line along a public street or highway is no part of the equipment of the street, but is foreign to its use, and the imposition of an additional servitude, for which the abutting owner must be compensated; and also that the legislature has no power to authorize the imposition of such servitude,

\* REFERENCE TO MONOGRAPHIC NOTES.

Telegraph and telephone companies, right to erect and maintain poles and wires in public streets and highways, and proceedings to abate the same: 54 Am. Rep. 299, 298; 57 Am. Rep. 409-412; 19 Am. St. Rep. 130, 131; 16 Am. St. Rep. 614.

except on condition that due compensation shall be made therefor to such abutting owner. Under this rule the abutting owner is entitled to an injunction restraining the maintenance or erection of a line of telegraph or telephone poles and wires in front of his premises, unless he is first compensated therefor, or his consent thereto is in some manner obtained.

*Cases Holding that Abutting Owner is not Entitled to Additional Compensation.*

— The courts of Missouri have uniformly maintained that the erection of telegraph and telephone poles and wires in public streets or highways does not impose a new and additional servitude thereon; that this is simply a new use to which the street may be put, under legislative sanction, without the consent of the abutter; that he has no right to restrain such use by injunction, or to have the poles removed as a nuisance; and that the legislature has power to authorize such use without providing for compensation therefor to the abutting land-owners. This doctrine was first announced in *Gay v. Mutual Union Telegraph Co.*, 12 Mo. App. 485, followed and affirmed in *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398, and in *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; and *State v. Flad*, 23 Mo. App. 185. The court, in *Julia Building Association v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398, based its decision on the following reasons: "These streets are required by the public to promote trade, and facilitate communications in the daily transaction of business between the citizens of one part of the city with those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth Street wishes to communicate with a citizen living and doing business on the other end or at any intermediate point, he is entitled to the use of the street, either on foot, on horseback, or in a carriage or other vehicle, in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously, and with more dispatch than any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footman, horsemen, or carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the same purpose which would otherwise require its use, either by a thousand footmen, horsemen, or carriages, to effectuate the same purpose. In this view of it, the erection of telephone poles and wires for the transmission of oral messages, so far from imposing a new and additional servitude, would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage. If it be true, as laid down by the authorities herein cited, that when the public acquires the right to a street, either by dedication, grant, or condemnation, the municipality has the power to appropriate it, not only to such uses as are common and in vogue at the time of its acquisition, but also to such new uses as advanced civilization may suggest as conducive to the public good, the conclusion is inevitable, that the use of Sixth Street in the manner and for the purposes proposed is allowable, for it cannot, with any show of reason, be denied that the means these appliances would afford for the instantaneous transmission of communications for the transaction of business, without resorting to the slower and common methods of bearing them, would be conducive to the public good, and make the street by these means serve one of the chief purposes for which it was dedicated. But it is argued that the erection

of two telephone poles, each eighteen inches at the bottom, with a gradual taper to the top, would obstruct the street, and deny to the public the complete and unrestricted use of the street. This argument, I think, is more specious than sound. It is true that to the extent of the space of eighteen inches, each of the poles proposed to be erected would be an obstruction, but the same could be said of lamp-posts erected on the streets of a city, the necessities of which might require its streets to be lighted with oil, gas, or electric lights; and yet no one would be heard to complain that the lamp-posts constituted such an obstruction or impediment to the free use of the streets as to demand their removal. . . . If the conclusions announced in the foregoing part of this opinion, that all the uses to which a street may properly be devoted are to be regarded as permitted by and included in the original appropriation or dedication of the street, and that the erection and maintenance of telephone-poles as proposed is one of these uses, and that in digging holes through the stone slabs and stone walks in which to plant them, there is no taking of private property of the abutting lot-owner entitling him to compensation, are correct, it would seem logically to follow that damages resulting from such use need not be compensated for. If, by reason of the dedication, the public have the right to apply the private property of the plaintiff to the use proposed without his being entitled to compensation, how can it be that it becomes entitled to compensation for damages flowing as an incident from an act which the dedicator by his dedication has authorized to be done? If the dedication of the street is sufficiently operative to allow private property in the soil of the street to be actually invaded, and physically taken for a street use without compensation, why is it not sufficiently operative, if in such taking damages ensue, to relieve the taker from the payment of such damages? If, by dedicating property for a street, the dedicator gives up his right to compensation for the uses included in the dedication, how can it be said that he does not also give up his right to compensation for damages to adjacent property not taken, resulting from the application of the street to a use which, by his dedication, he authorized it to be put?"

The views above announced are ably and forcibly refuted by Mr. Justice Henry, in a dissenting opinion, which is reported in a note to the principal case in 57 Am. Rep. 409. In *McCormick v. District of Columbia*, 4 Mackay, 396, 54 Am. Rep. 284, it was also decided that the erection of telegraph poles and wires in the street was not such a private nuisance as would be restrained by injunction at the suit of an abutting lot-owner. And in *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7, it was determined that the above rule was law, and that the legislature might authorize their erection on the line of a public highway without providing for compensation to the owner of the fee therein. In this case the court said: "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then known vehicles, or of using it in the then known methods for either the conveyance of property or transmission of intelligence. . . . The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. . . . We are therefore of opinion that the use of a portion of a highway for the public use of companies organized under the laws of the state for the transmission of intelligence by electricity, and subject to the supervision of the local municipal authorities, which has been permitted by the legislature, is a public use similar to that for which the

highway was originally taken, or to which it was originally devoted, and that the owner of the fee is entitled to no further compensation. . . . That it was the intent of the statute to grant to those corporations, formed under the general incorporation laws for the purpose of transmitting intelligence by electricity, the right to construct lines of telegraph upon and along highways and public roads, upon the locations assigned them by the officers of the municipalities wherein such ways are situated, cannot be doubted. . . . There remains the inquiry, whether there is any objection to the statute because it does not provide a sufficient remedy for the owners of property near to or adjoining the way, who may be incidentally injured by the structures which the telegraph companies may have been permitted to erect along the line of the highway and within its limits. . . . The only compensation to which such owner is entitled is that which the legislature deems just, when it permits the erection of these structures. The legislature may provide for compensation to the adjoining owners, but without such provision there can be no legal claim to it, as the use of the highway is a lawful one." The same rule is announced in *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63, where it was decided that the state and municipal corporations, in the exercise of the right of eminent domain and of the police power, may authorize telephone companies to use the streets and sidewalks of a city for the purpose of erecting poles and other works necessary for the transmission of intelligence, and can impose terms and conditions for the enjoyment of the privilege; but the adjoining owners in front of whose premises such poles have been so erected have no right to require the removal of the same as nuisances, when the poles do not materially obstruct them in the free use of their property, or inflict on them some injury which is not common to all other persons.

In *Roake v. American Telephone etc. Co.*, 41 N. J. Eq. 35, an injunction was refused an abutting owner to restrain a telegraph and telephone company from stretching its wires over the land in the street in front of his property. The court said: "The city claims the right to use the streets for the purpose of telegraphic or telephonic communication; that such use is part of the public uses to which the streets of a city may lawfully be put by the city authorities, without the consent of the owners of lots abutting on the streets, or making compensation to them. The legislature of this state appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the street; for while it recognizes such rights as to the erection of poles, it does not do so as to the wires. It is laid down that if telegraph posts be erected within the limits of a street or highway without legislative authority, they are nuisances, but if the erection be thus authorized they are not. In the case in hand the company does not, as before stated, intend to erect poles on the land in front of complainant's lot, but means merely to stretch its wires along the front, at least twenty-five feet above the ground, on poles erected on adjacent or neighboring property. The present injury from such use cannot be great. It certainly is not so great as to warrant a preliminary injunction."

A railroad company may, for its own use in operating its road, construct a telegraph or telephone line over and along its right of way, and in so doing may cut down trees, if necessary, thereon standing, or in any other way use its right of way for such purpose, without subjecting itself to any additional claim by the original land-owner for compensation. But if the line is not constructed for such purpose, it will be a new servitude, putting an additional burden on the land, for which the original owners of the land are entitled to

be compensated: *Western Union Tel. Co. v. Rich*, 19 Kan. 517; 27 Am. Rep. 159; *American Telephone etc. Co. v. Pearce*, 71 Md. 535.

*Cases Holding Abutting Owner Entitled to Additional Compensation.* — The cases which maintain that the erection of a line of telegraph or telephone poles and wires on a street or highway is foreign to its use, and the imposition of a new and additional servitude, which the adjoining owner has the right to restrain by injunction, unless his consent is first obtained or he is compensated therefor, may be grouped as follows: *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507; 47 Am. Rep. 453; *Broome v. New York etc. Telephone Co.*, 42 N. J. Eq. 141; *State etc. Telephone Co. v. Mayor of Newark*, 49 N. J. L. 344; *Western Union Telegraph Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 903; *Willie v. Erie Telegraph etc. Co.*, 37 Minn. 347; *Stowers v. Postal Telegraph etc. Co.*, 68 Miss. 559; 24 Am. St. Rep. 290; *Dusenbury v. Mutual Telegraph Co.*, 11 Abb. N. C. 440; *Metropolitan Telephone etc. Co. v. Colwell Lead Co.*, 67 How. Pr. 365; 60 N. Y. Sup. Ct. 488; *Pacific Postal Telegraph etc. Co. v. Irvine*, 49 Fed. Rep. 113. The majority of these cases maintain that neither the legislature nor any municipal corporation can authorize the erection of a line of posts and wires in a street or highway without providing for compensation to the abutting owner, whether the fee is in him or in the public: *Stowers v. Postal Telegraph etc. Co.*, 68 Miss. 559; 24 Am. St. Rep. 290, and cases cited. But there is some difference of opinion on this point, although it may be questionable if any sound reason therefor exists. This distinction is shown by the case of *Pacific Postal Telegraph Co. v. Irvine*, 49 Fed. Rep. 113, where it was said: "It appears that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there is no valid legal objection to the grant by the public of a right to erect such poles and wires, without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and its use for purposes of public travel has been granted, I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to law." In *Western Union Telegraph Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 916, the court said: "That the erection of a telegraph line upon a highway is an additional servitude is clear from the authorities. That it is such is equally clear upon principle, in the light of the Virginia cases cited above. If the right acquired by the commonwealth in the condemnation of a highway is only the right to pass along over the highway for the public, then, if the untaken parts of the land are his private property, to dig up the soil is to dig up his soil; to cut down the trees is to cut down his trees; to destroy the fences is to destroy his fences; to erect any structure, to affix any pole or post, in and upon his land, is to take possession of his land; and all those interfere with his free and unrestricted use of his property. If the commonwealth took this without just compensation it would be a violation of the constitution. The commonwealth cannot constitutionally grant it to another. It is true that the use of the telegraph company is a public use; that the company is a public corporation, as to which the public has right which the law will enforce. But the public rights can only be obtained by paying for them. The use, while in one sense public, is not for the public generally; it



is for the private profit of the corporation. It is its business enterprise, engaged in for gain. Its services can only be obtained upon their being paid for. There is no reason, either in law or common justice, why it should not pay for what it needs in the prosecution of its business. Upon this burden being placed upon it, it can complain of no hardship; it is the common lot of all. If the said company has use for the private property of a citizen of this commonwealth, and it is of advantage to it to have the same, it is illogical to argue that the property is of small value to plaintiff, and in the aggregate a great matter to the plaintiff in error. This argument is not worth considering; it cuts at the very root of the rights of property. It would apply with equal force to all the transactions of life. It is sufficient to say, the *agis* of the constitution is over this as over all other private property rights, and there is no power which can divest it without just compensation." In *Broome v. New York etc. Telephone Co.*, 42 N. J. Eq. 141, a mandatory injunction requiring a telephone company to remove its poles from the highway in front of complainant's premises, and forbidding it to erect others there, was granted, and in this case the court said: "The defendants, a telephone company, without any leave or license from or consent by the complainant, but, on the other hand, against his protest and remonstrance, and in disregard of his warning and express prohibition, and without condemnation, or any steps to that end, set up their poles upon his land. . . . It is enough to say that it does not appear that the road board had any power to authorize any one to set up poles in the land of the highway, and thus subject the land to an additional servitude besides that for which it was condemned. What has been said is sufficient, of itself, to establish the right of the complainant to relief; for in order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or by condemnation from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough." In *Board of Trade Telegraph Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453, it was announced that legislative authority to telegraph companies to erect poles in the public street is subject to the liability to make just compensation to the adjacent land-owners for the use, and the court said: "The position taken by the defendant is, that the state can rightfully, as it has done, authorize the county board to permit defendant to construct its line of telegraph upon the highway without the consent of the abutting land-owner, that it imposes no new or additional burden thereon, and that when the public acquire an easement over land, for a compensation fully paid, the public obtain all the rights the land-owner had, and the state may authorize any use of it not inconsistent with its use as a highway. On the other hand, it is insisted the proprietary rights of plaintiff had been interfered with in a manner detrimental to his interests as the owner of the fee, and that the action of defendant in taking possession of his land forcibly and against his will comes within the constitutional inhibition, 'private property shall not be taken or damaged without just compensation.' The latter position is the one best sustained by authority, and rests on sounder principles. It is for the reason the construction and maintenance of a telegraph line upon the highway is a new and additional burden upon the fee to which it was not contemplated it should be subjected, and for which the owner is entitled to additional compensation. The principle is, neither the state nor a municipal corporation has any rightful authority, under the constitution, to grant away the private property of the citizen; and if corporations *quasi* public, in the exercise of the right of eminent domain with which

they are clothed by the sovereign power of the state, seek to appropriate it, so that they may have a benefit therefrom, every principle of justice demands they should make just compensation, whether the property taken or damaged is of little or great value." A railway upon a highway is an additional servitude, and "in the same sense, the construction of a line of telegraph on the highway is an additional servitude, to which the fee of the land had not before been subject. The servitude differs more in degree than in character, and whether the damages are great or small, the corporation asking for or appropriating to itself the benefit of such new servitude must make just compensation to the owner of the fee."

*Invasion of Private Property is Unlawful, and may be Enjoined.* — The invasion of private property in which the public has obtained no easement, for the purpose of erecting telegraph or telephone poles, or for stringing wires, is unquestionably unlawful, and may be restrained by injunction. This question is decided in *American Telephone etc. Co. v. Pearce*, 71 Md. 535, where it was determined that a telegraph or telephone company is, with respect to the right to construct its lines over private property, just as much subject to the constitutional prohibition against taking private property for public use without just compensation as is a railway or any other corporation clothed with the power of taking private property for public use; and the averment that such company is proceeding, or threatens to proceed, to construct its line of poles or wires on and over the complainant's land without his leave or license, and without paying or tendering him compensation for the use of his land for this purpose, is sufficient to entitle him to an injunction. Under a license from a municipal corporation for the erection of a telephone line, or a fire-alarm telegraph, there is no authority to enter private property and cut off the limbs of trees, although they project over the line of the sidewalk on the street: *Tisot v. Great Southern Telegraph etc. Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248; *Memphis Bell Telephone Co. v. Hunt*, 16 Lea, 456; 57 Am. Rep. 237.

**ELECTRIC-CAR POLES AND WIRES ON STREETS AND HIGHWAYS NOT AN ADDITIONAL SERVITUDE.** — A question closely allied to the one above considered is, whether or not the erection of poles and stringing wires in the street for the purpose of propelling electric street-cars imposes an additional servitude for which the adjoining owner is entitled to compensation; and whether or not a failure to obtain such compensation, and an attempt to appropriate the street to such use without his consent and against his expressed wish, will entitle him to an injunction. The authorities seem to be unanimous in answering this question in the negative, and to the effect that the placing of poles and wires in the street for the purpose of using electricity for street-car propulsion does not impose a new servitude on the land in the street, and may be authorized by legislative or municipal authority without compensation to the abutting owner of the land: *Detroit City Railway v. Mills*, 85 Mich. 634; *Halsey v. Rapid Transit etc. R'y Co.*, 47 N. J. Eq. 380; *Potter v. Saginaw Union etc. Railway*, 83 Mich. 285; *Barber v. Saginaw Union etc. Railway*, 83 Mich. 299; *Taggart v. Newport Street R'y Co.*, 16 R. I. 668; *Williams v. City Electric Street R'y Co.*, 41 Fed. Rep. 556, in which the following *sylabus* was prepared by the court. "The operation of a street-railroad by mechanical power, when authorized by law, on a public street is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use only of the street as a public highway, and affords to the owner of the abutting property, though he may own the fee of

the street, no legal ground of complaint." In *Taggart v. Newport Street R'y Co.*, 16 R. I. 668, the court said: "The street railway here complained of is operated by electricity. It does not appear, however, that it occupies the streets or highways any more exclusively than if it were operated by horse power. The answer avers that 'electricity, besides being as safe and as easily managed as horse power for the propulsion of street-cars, is more quiet, more cleanly, and more convenient than horses, both for residents on the streets used by said cars for the public generally, and also causes much less wear and injury to the streets and highways than is occasioned by street-cars of which horses are the motive power.' These averments, the case being heard on bill and answer, must be taken as true. We see no reason to doubt their truth. It is urged that electricity is a dangerous force, and that the court will take judicial notice of its dangerousness. The court will take notice that electricity, developed to some high degree of intensity, is exceedingly dangerous, and even fatally so, to men or animals, when brought in contact with them; but the court has no judicial knowledge that, as used by the defendant company, it is dangerous. The answer denies that it is dangerous to either life or property. It is also urged that the cars, moving apparently without external force, alarm and frighten horses. This, so far as it is alleged in the bill, is denied in the answer. We see no reason to suppose that this danger is so great that on account of it the railway should be regarded as an additional servitude. The answer alleges that many street-railways, operated by electricity in the same manner as the defendant's, are in use in different states, and that many more are in process of construction. Reference has been made to cases which hold that telegraph or telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation, and from these cases it is argued that the railway here complained of is an additional servitude by reason of the poles and wires which communicate its motive power. There are cases which hold as stated, and there are cases which hold otherwise. But assuming that telegraph and telephone poles and wires do add a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street-railway likewise add one. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street-cars are propelled."

## FRANK v. BENESCH.

[74 MARYLAND, 58.]

**WAYS — INTERFERENCE WITH, BY OWNER OF FEE.** — Where a right of way is granted without metes or bounds or description defining its width, the owner of the fee may contract the width of the way, or obstruct it in any manner, so long as he does not interfere with its necessary and reasonable use for the purposes for which it was granted.

**WAYS — RIGHT TO CONTRACT OR OBSTRUCT.** — The owner of the fee in an alley, as against the owner of a right of way therein by grant, may change the position of a gate in the alley, erect a wooden platform across it, and contract its width an inch and a half by wainscoting the walls leading from the old entrance to the new gate, if these acts do not interfere with the necessary and reasonable use of the right of way; and whether they do or not is a question for the jury to determine.

*D. Greenbaum*, for the appellant.

*William Burns Trundle*, for the appellee.

ROBINSON, J. The plaintiff and defendant are owners of adjoining houses, and between the two houses there is an alleyway, used in common by the respective owners, for the purpose of ingress and egress to and from the back buildings and premises. The joists of the defendant's second story run across the alley, and into the wall of the plaintiff's house, and to the extent of the width of the second story of defendant's house the alley is a covered way. At the time the plaintiff bought his house, and for more than twenty years prior thereto, there was a wooden gate at the entrance to the alley. This gate was taken down by the defendant, and a new gate put up, about five feet back from the entrance. He also put a wooden platform, about seven inches and a half high, across the alley, so that in going in and coming out the alley persons were obliged to step on this platform. He also wainscoted the walls leading from the old entrance to the new gate, and thus narrowed the width of the alley an inch and a half. These acts on the part of the defendant, it is alleged, are an invasion of the plaintiff's legal rights, even though such acts may not in any manner interfere with the reasonable and necessary use by him of the alleyway. The two houses originally belonged to the same person, under whom both the plaintiff and defendant claim. The right of way thus claimed by the plaintiff, being derived from a grant, the nature and extent of this right must be governed by the terms of the grant itself. Now, by reference to the defendant's deed, the alley we find is entirely within his lines, and he is therefore the owner of the freehold.

The plaintiff's deed merely calls for the alley, which is described as being about two feet wide, with the privilege of using the alley in common with the defendant. The case, then, is one in which the defendant is the owner of the alley itself, and the plaintiff is the owner of a right of way over it. And such being the case, we take the law to be well settled, that where a right of way is granted, in the absence of metes and bounds, or description of some kind, defining the width of the way, the way-owner is only entitled to the necessary and reasonable use of the way for the purposes for which it was granted. The plaintiff's right being, then, a mere easement, all other rights and benefits of ownership consistent with such easement belong to the defendant, as owner of the freehold.

And the obligation on the part of the defendant as such land-owner or servient owner is, that he shall not so contract the width of the alley, or obstruct it in any manner, as to interfere with the necessary and reasonable use of it by the plaintiff as an alleyway according to the terms of his grant. This is well settled by all the authorities. In *Hutton v. Hamboro*, 2 Post. & F. 218, where an action of trespass was brought against the defendant for taking up gate-posts along a right of way, to the use of which he was entitled in common with the plaintiff, and the defendant set up as a defense that the gate-posts were an interference with his right of way, Cockburn, C. J., said: "The question is, whether, practically and substantially, the right of way can be exercised as conveniently as before, or whether the defendant has really lost anything by the alteration made by the former owner and continued by the plaintiff. If you think that for all practical and useful purposes the way is the same as before, find for the plaintiff; if you think otherwise, find for the defendant." And then again, in *Clifford v. Hoare*, L. R. 9 C. P. 362, in an action for obstructing a right of way, Lord Coleridge, C. J., said: "If this had been an absolute conveyance of a forty-foot road, set out by metes and bounds, and a portion of it had been obstructed by the conveying party, no doubt an action might have been maintained for that trespass. But that is not this case; that which is granted is a right of way, an easement over a road, the soil of which remains in the grantor. . . . We gather from the language of this deed that the intention was to grant the plaintiff an easement only, — the reasonable use and enjoyment of an ascertained way." And so in *Hawkins v. Carbins*, 3 Hurl. & N. 914, it was held that where premises are

demised or conveyed with a right of way thereto, it is a question for the jury what is a reasonable and necessary use of the way. We may also refer to the leading case of *Atkins v. Borden*, 2 Met. 457, 37 Am. Dec. 100, where the question is fully considered in an opinion by Shaw, C. J., and to *Baker v. Frick*, 45 Md. 340; 24 Am. Rep. 506.

Now, in granting the plaintiff's second prayer, the question whether the acts on the part of the defendant interfered with the reasonable and convenient use and enjoyment of the alleyway by the plaintiff was fairly submitted to the jury. This, in fact, was the only question open for the determination of the jury, and this being so, there was no error in refusing the several other prayers offered by the plaintiff, nor in granting the prayers of the defendant.

Judgment affirmed.

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OWNER OF LAND SUBJECT TO RIGHT OF WAY has a right to use his land in any way not inconsistent with the easement: *Herman v. Roberts*, 119 N. Y. 37; 16 Am. St. Rep. 800; *Welch v. Wilcox*, 101 Mass. 163; 100 Am. Dec. 113. In the latter case it was held that where the right to use a passageway three feet wide had been granted with the limiting description, "as now laid out," the erection of gate-posts which narrowed the passage three inches was an unlawful obstruction, the court assuming that the description referred to some well-marked boundaries recognised by the parties. In the absence of some such restriction as the above, it would appear that the owner of the fee may maintain gates: *Phillips v. Dressler*, 123 Ind. 414; 17 Am. St. Rep. 375. *A fortiori*, he may do so where the grant of the right of way declares it to be "a mere easement" of travel and private road privilege, but no other greater or further estate whatever, or title or interest of any kind whatever: *Whaley v. Jarrett*, 69 Wis. 613; 2 Am. St. Rep. 764. On the other hand, it is held that projections over a passageway which do not interfere with the uses for which it was designed are not unlawful obstructions; as, for example, where bay-windows were built about seven feet above the ground over an alley too narrow for use by horse vehicles: *Burnham v. Novins*, 144 Mass. 38; 59 Am. Rep. 61, and note.

WHETHER AN OBSTRUCTION IS UNREASONABLE IS A QUESTION FOR THE JURY: *Baker v. Frick*, 45 Md. 337; 24 Am. Rep. 506; *Johnson v. Berson*, 77 Wis. 593; 20 Am. St. Rep. 146.

## HAINES v. CAMPBELL.

[74 MARYLAND, 133.]

**SLANDER — ACTIONABLE WORDS — INNUENDO.** — A count in a complaint for slander alleging that defendant falsely and maliciously spoke and published of plaintiff, in relation to the burning of a certain barn, the words, "I threw the burning of William Witman's barn into Campbell's face," meaning thereby that plaintiff had committed the felonious crime of maliciously and voluntarily burning said barn, states a cause of action, although such words, without explanation, are not actionable in themselves.

**SLANDER — MEANING OF WORDS — PROVINCE OF JURY.** — When the words uttered and charged as slanderous are capable of the meaning attributed to them in the innuendo, as explanatory of the previous part of the declaration, it must be left to the jury to find whether or not they were in fact so understood by the persons who heard them.

**SLANDER — IMPUTING FELONY.** — When the words spoken convey an imputation of a felonious crime, they are slanderous and actionable in whatever mode their meaning may be expressed, whether by way of insinuation, interrogation, by ironical praise, or by any form of speech so understood by the hearers.

**SLANDER — INNUENDO.** — A count in an action for slander alleging that defendant falsely and maliciously spoke and published of plaintiff, in relation to the burning of a certain barn, the words, "While I did not tell Campbell that he burnt Witman's barn, I gave him to understand that his nearest neighbors believed he did," meaning thereby that plaintiff's neighbors charged that he was guilty of the felonious crime of maliciously and voluntarily burning said barn, states a cause of action.

**SLANDER — LIABILITY FOR REPEATING.** — One who repeats a slander which he has heard, without expressing any disbelief in it, or any purpose of inquiring as to the truth, is himself guilty of slander, though he may have repeated it without any design to extend its circulation or credit, or to cause the person to whom it is addressed to believe or suspect it to be true, unless it is repeated on a justifiable occasion; and the burden of proof is on him to prove an occasion which justified him in repeating it.

**SLANDER.** The action was brought by Campbell against Haines; judgment for plaintiff, and defendant appealed.

*L. Marshall Haines and Robert C. Thackery*, for the appellant.

*Albert Constable*, for the appellee.

BRYAN, J. (after stating the case). No objection has been stated to the first count, nor have we perceived any. In the second count it was alleged that the defendant spoke these words of and concerning the plaintiff: "I threw the burning of William Witman's barn into Campbell's face." The words, without some prefatory explanation, would convey no meaning sufficiently definite for the action of a court of justice. The

count, however, sets forth that Witman was the owner of a farm in the state of Pennsylvania, upon which there was a barn, not adjoining any dwelling-house, and in the barn there were hay and grain; that the barn had been destroyed by burning; "that at the time of the said burning, and thence hitherto, by the law of said state, any person who maliciously and voluntarily burns any barn having hay or grain therein, although the same shall not be adjoining to any dwelling-house, shall, upon legal conviction thereof, be sentenced to undergo solitary confinement in the eastern or western penitentiary of said state, at labor, for a period of not less than one or more than ten years for the first offense, and not more than fifteen years for the second offense." It was then alleged that the defendant falsely and maliciously spoke and published of the plaintiff, in relation to the burning of the barn, the words above mentioned. The court is thus informed of the fact of the burning and its penal consequences if maliciously and voluntarily done. These statements, in the technical language appropriate to the action of slander, are called the averment. The colloquium is the conversation or discourse in relation to the extrinsic facts embraced in the averment. The innuendo is the statement that the defendant meant that "he, the plaintiff, had committed the crime of maliciously and voluntarily burning the said barn of the said Witman in the state of Pennsylvania." In *Dorsey v. Whipps*, 8 Gill, 463, it is said: "If the words in themselves are not actionable, their meaning cannot be extended by it [the innuendo], to make them actionable. If the words may be understood in a sense not criminal, there must be a colloquium in the introductory part, to show they were spoken in a criminal sense, or they are not actionable. The office of the innuendo is to explain doubtful words, where there is matter sufficient in the declaration to maintain the action": *Sheely v. Biggs*, 2 Harr. & J. 364; 3 Am. Dec. 552. Again, "an innuendo cannot extend the sense of the words beyond their own meaning, unless something be put upon the record for it to explain": 1 Starkie on Slander, 422; *Jones v. Hungerford*, 4 Gill & J. 402. And in *Peterson v. Sentman*, 37 Md. 155, 11 Am. Rep. 534, it is said: "Words that are not actionable *ex vi termini* cannot be made so by an innuendo, but must be aided by a proper averment and colloquium, which will warrant the explanatory meaning given them by the innuendo." But if the words are capable of the meaning attributed to them in the innuendo, as explanatory



of the previous part of the declaration, it must be left to the jury to find whether they were in fact so understood by the persons who heard them. The words, "I threw the burning of William Witman's barn into Campbell's face," under the circumstances alleged in the second count, are certainly capable of meaning that Campbell maliciously and voluntarily burnt Witman's barn; and if so, they are actionable.

The third count contains the same averment and colloquium as the second. The defamatory words charged are these: "While I did not tell Campbell that he burnt Witman's barn, I gave him to understand that his nearest neighbors believed that he did." The innuendo is the same as in the second count. If words spoken convey an imputation of crime, they are actionable in whatever mode their meaning may be expressed; they may be by way of insinuation, interrogation, by ironical praise, or by any form of speech understood by the hearers. We think that the words charged in this third count are sufficient to maintain the innuendo.

In the fourth count the averment, colloquium, and words charged are the same as in the third. The innuendo is thus set forth: "Meaning thereby that the plaintiff's neighbors charged that he, the plaintiff, was guilty of the crime of maliciously and voluntarily burning the said barn of the said Witman." These words disparage the character of the plaintiff, and convey an imputation of crime, and must impose liability on the defendant for uttering them, unless there be some impunity for the repetition of slander. At one time, it was held, on the authority of *Earl of Northampton's Case*, 12 Coke, 134, that if a person repeated a slander, and mentioned at the same time the name of the person from whom he heard it, he would have a good defense to an action brought against him. This doctrine has been very much questioned and criticised by eminent judges, both in England and America, and has finally been entirely overthrown. In *McPherson v. Daniels*, 10 Barn. & C. 263, Bayley, J., said: "By repeating slander, a person, although he state at the time that he heard it from another, gives it a degree of credit; for the repetition of it imports a degree of belief in the truth of the slander. If I hear another say A is a thief, and that B, though a person of bad character, told him so, I am induced to think that the person who repeats it gives some credit to the statement. It seems to me, therefore, that a person cannot be justified in repeating slander, unless he believes it to be true. But that alone is not

sufficient. I think it can only be repeated upon a justifiable occasion. Every publication of slanderous matter is *prima facie* a violation of the right which every individual has to his good name and reputation. The law, upon grounds of public policy and convenience, permits, under certain circumstances, the publication of slanderous matter, although it be injurious to another. But such act being *prima facie* wrongful, it lies upon the person charged with uttering slander, whether he were the first utterer or not, to show that he uttered it upon some lawful occasion. Upon the whole, I am of opinion that a man cannot by law justify the repetition of slander by merely naming the person who first uttered it; he must also show that he repeated it on a justifiable occasion, and believed it to be true." And in the same case Parke, J., said: "A man's reputation is entitled to the protection of the law against those slanders which it considers to be injurious; and as every one who publishes such a slander injures that reputation, he is guilty of a wrongful act, and upon principle is liable in a civil action for any damage arising to another by reason of that wrongful act. I agree with what is said by Lord Chief Justice Best in *De Crespigny v. Wellesley*: 'Because one man does an unlawful act to any person, another is not to be permitted to do a similar act to the same person. Wrong is not to be justified or even excused by wrong.' A man does a wrong by, and is therefore liable to an action for, every repetition of slander; and if that be so, is the repeating of the slander less a wrong because the person who repeats it is not the same who first uttered it?" In *Watkin v. Hall*, L. R. 3 Q. B. 396, the questions are thus stated by Blackburn, J.: "The only questions are, whether or not an action will lie for stating — upon an occasion which does not show the communication to be privileged — that there is a rumor upon the stock exchange that the plaintiff, who is a trader, was in insolvent circumstances and had failed; the defendant stating, not that the plaintiff was insolvent, but that there was a rumor to that effect; and whether it would be a justification to show that the rumor did exist, and that the defendant had only repeated it, and stated at the time openly that it was only a rumor." And it was held that the action would lie. In *Waters v. Jones*, 3 Port. 442, 29 Am. Dec. 261, the words were: "It is the general opinion of the people in Jones's neighborhood that he burnt C.'s gin-house," and they were held to be actionable. In *Kenney v. McLaughlin*, 5 Gray, 3, 66 Am. Dec. 345, the result of the court's opinion is thus

reported: "A repetition of a slander already in circulation, without expressing any disbelief of it, or any purpose of inquiring as to the truth, though made without any design to extend its circulation or credit, or to cause the person to whom it is addressed to believe or suspect it to be true, is actionable." And a great many other cases may be cited to the same effect. A number of them are collected in the last edition of Odgers on Libel and Slander, 124-127. See also Folkard's Starkie on Slander, sec. 318. The principle is well established that every repetition of a slander renders the speaker liable to an action. The circulation of scandal greatly multiplies and increases its potency for mischief. He who originally publishes a slander inflicts an injury on his neighbor; and he is of equal guilt and malevolence who assists in the propagation of it. The substance of the words charged in the fourth count is, that the plaintiff's nearest neighbors believed him guilty of a heinous crime. Such words are in the highest degree defamatory, charging that in the opinion of those who ought to know him best, the plaintiff was legally liable to an infamous punishment.

The decision in *Simmons v. Mitchell*, L. R. 6 App. Cas. 156, was much pressed upon us in the argument. It was held in that case that the words which were the subject of complaint meant that there was a case of suspicion, and suspicion only, against the plaintiff. In the opinion of their lordships of the privy council, it is said: "It is to be observed that the plaintiff does not in any of his innuendoes declare that the words of which he complains were spoken with the intention of imputing to him a felony; that is to say, the crime of murder. The innuendoes do not purport to enlarge the meaning of the words, and if the words themselves convey only suspicion, the innuendoes do no more." It was not disputed that in point of law, words merely conveying suspicion would not sustain an action of slander.

The demurrers were properly overruled.

Judgment affirmed.

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COLLOQUIUM AND INNUENDO are treated in the note to *Van Vechten v. Hopkins*, 4 Am. Dec. 348-351.

OFFICE OF INNUENDO IS TO EXPLAIN WORDS spoken, and it cannot enlarge or extend their sense beyond their usual import: *Patterson v. Wilkinson*, 55 Me. 42; 92 Am. Dec. 568, and note. A complaint in slander must aver that words not actionable in themselves were used in a criminal sense: *Miles v.*

*Vankorn*, 17 Ind. 245; 79 Am. Dec. 447; *Harris v. Zanone*, 93 Cal. 59; *Powell v. Crawford*, 107 Mo. 595.

WHEN THE WORDS CHARGED ARE SUSCEPTIBLE OF A TWOFOLD MEANING, it is the province of the jury to determine from the circumstances in what sense they were uttered and understood; *Dedway v. Powell*, 4 Bush, 77; 96 Am. Dec. 283.

WORDS ARE ACTIONABLE *per se*, when they charge a person with having committed an act for which, if the charge were true, he would be punishable criminally by indictment: *St. Martin v. Desnoyer*, 1 Minn. 156; 61 Am. Dec. 494; *Hendrickson v. Sullivan*, 28 Neb. 329. In *Gudger v. Penland*, 109 N. C. 593, 23 Am. St. Rep. 73, such an act is defined to be one which is punishable by incarceration in a state prison. On the other hand, it is held in *Pornett v. Marble*, 62 Vt. 481, 22 Am. St. Rep. 126, that the place of confinement is immaterial, provided the crime charged would have subjected the offender to corporal punishment. See also notes discussing what words are actionable *per se*, *Coburn v. Harwood*, 12 Am. Dec. 39-46; *McFadin v. David*, 41 Am. Rep. 590-592.

LIABILITY FOR REPEATING SLANDER. — The repetition of slanderous words cannot be justified unless done from good motives and without malice, and the repeater must give not only the precise words of the author, but the name of a responsible person against whom the injured party may bring his action: *Jarnigan v. Fleming*, 43 Miss. 710; 5 Am. Rep. 514. The authority, if mentioned, should be such a one as would induce reasonable belief: *Heraf v. Ringwalt*, 3 Yeates, 508; 2 Am. Dec. 392.

## HELFRICH v. CATONSVILLE WATER COMPANY.

[74 MARYLAND, 209.]

WATERS — RIGHT TO POLLUTE. — The right of a riparian proprietor to the use of a stream of water in its natural purity cannot override other co-equal and co-existing rights, and must yield to those of a more absolute and unqualified character, such as the tillage of his soil, or the tending of his herds and flocks by the upper proprietor, even though such use leads to the pollution of the stream.

WATERS — RIGHT TO POLLUTE — COMPENSATION FOR WATER RIGHT. — An incorporated water company, owning lands adjacent to a stream of water, cannot deprive an upper riparian owner, through whose land a pure natural stream of fresh water flows, of his right to use his land in a reasonable and usual manner for the purpose of pasturing his cattle, without first making him due compensation for his water right, even though such use causes the serious pollution of the stream.

*Ferdinand C. Dugan and George R. Willis*, for the appellant

*Edwin J. Farber and John I. Yellott*, for the appellee.

BRYAN, J. The Catonsville Water Company was incorporated by the act of 1886, chapter 100. It was chartered for the purpose of enabling it to supply with pure water the inhabi-

tants of Catonsville and the adjoining portion of Baltimore County. In pursuance of its charter, it has acquired a tract of land, and constructed, at large expense, a dam and reservoir, water-works, mains, and pipes; and is engaged in supplying a large number of people with water for drinking and other necessary purposes. A pure, clear, natural stream of fresh water flows through and along the land of Samuel D. Helfrich, and through the land of the water company, which is situated about a hundred and forty perches farther down the stream, and is the principal source of supply for the purposes of the company's business.

A bill of complaint was filed by the water company on the equity side of the circuit court for Baltimore County, in which it was alleged that Helfrich permitted a large number of his cows to enter said stream, and stand therein, and that they dropped their excrement, dung, and filth into its waters, and greatly polluted and befouled them, and that in consequence of such deposits, when the stream flowed through the water company's land and supplied its works, the purity of the water was greatly impaired, and it was rendered unhealthy and unfit for drinking purposes. On these grounds an injunction was prayed and granted, restraining Helfrich from permitting cows or other animals to enter or stand in the stream, and to drop or deposit therein any excrement, dung, or filth, or in any manner to pollute or befoul it. The injunction, as granted, also prohibited the erection of a hydraulic ram; but (as we shall see) this question is not now presented by the record. After answer and testimony, the court, on final hearing, made the injunction perpetual, so far as it related to the pollution of the stream, and dissolved it as to the erection of the hydraulic ram. The defendant appealed to this court.

Helfrich's lot is on the south side of the Frederick turnpike, about one mile west of the village of Catonsville, and about half a mile from the water company's property. The lot has been used by the owner as a pasture for his cows, and so far as the evidence shows, it seems to be well adapted for such a purpose, being well provided with shade, grass, and water. Helfrich, at the time the injunction was issued, owned six cows, and it appears that he used his lot for the purpose of pasturing them in the way a proprietor, under ordinary circumstances, might reasonably use his own property. The question seems to be whether his rights have been in any way abridged or

diminished by the incorporation of the water company and the construction of its works.

The rights of riparian owners are well understood, and there is a general concurrence of opinion in the courts as to the manner in which they must be exercised. The law on this subject is strictly in accord with the common sense and general convenience of mankind. The owner of land has a right to the use of a stream of water which flows through it for all useful and reasonable purposes. This use is not an easement, but is an incident to his property in the soil, — a necessary, inherent, and inseparable portion of his ownership. But there is an equality of right in other riparian owners above and below him on the same stream, and from the necessary conditions of the case, they must not use the water to the prejudice of each other's rights. Hence difficult questions frequently arise; not as to the ascertainment of the principle of decision, but as to its application to interests which are in collision. It is laid down in general terms that every owner has the right to enjoy the stream of water which flows through his land in its natural state, without diminution to its flow, quantity, or purity. It is also held, with like generality of statement, that any defilement or corruption of the water, which prevents its use for any of its reasonable or proper purposes, is an infringement of the rights of riparian owners, which will entitle them to a remedy suited to the nature of the case. But all abstract rules are subject to considerable modification when they are applied to the exigencies of human life. The right to the use of a stream of water in its natural purity cannot override other co-equal and co-existing rights; it must certainly yield to those of a more absolute and unqualified character. The tillage of the soil and the tending of flocks and herds were the earliest occupations of the human race. The husbandman soweth his seed, and gathereth the harvest to furnish us with food; and the flocks and herds bring forth their increase for our use. It would be most unnatural and unwise to put any unnecessary restrictions on those pursuits which furnish the world with the means of subsistence. We must confess that the right of a man to cultivate his own fields and to pasture his cattle on his own land is of an original and primary character, and that it would be oppressive to interfere with the free exercise of it, except under a necessity caused by grave public considerations. The washings from cultivated fields might, and probably would, carry soil and manure into streams of water, and make them

muddy and impure. And so the habits of cattle, according to their natural instincts, would lead them to stand in the water and befoul the stream. But nevertheless the owner of the land must not lose the beneficial use of it. The inconveniences, which arise from the pollution of the water by these causes, must be borne by those who suffer from them. The ordinary requirements of domestic life diminish the purity of the atmosphere; but as long as these causes are within the limits of reason and necessity, the law recognizes no ground of complaint against them. The reasonable and proper exercise of acknowledged right by one man may and often does work annoyance and loss to another; but rights cannot be forfeited for this reason.

So far as we can see from the record, there was nothing unreasonable or unusual in the way in which the cattle were pastured in this lot. If Helfrich had wantonly or recklessly befouled the water of the stream, or had harassed the water company, or injured its business by an immoderate and excessive exercise of his acknowledged rights, he would justly have been responsible for his conduct. But nothing of this kind can be justly attributed to him. He seems to have used his pasture, as all men, time out of mind, have done in like cases. We are not unmindful of the vast number of cases where persons have been enjoined from committing nuisances in running streams, and from depositing, or permitting to be deposited, in them noxious, deleterious, or unwholesome matter, and from any unlawful or unreasonable thing which impairs the legitimate use of the water by riparian owners. Nor have we overlooked the numerous cases where it has been held that certain kinds of manufacturing establishments have infringed the vested rights of such owners. Our opinion is placed on the distinct ground that Helfrich was using his pasture-lot in a reasonable manner, and that he had a right so to use it. His right was not in any way abridged by the incorporation of the water company and the establishment of its works. And it was not in the power of the legislature to abridge it. It is a right of property protected by the declaration of rights. The water company has power under its charter to acquire the water-right by making due compensation to the owner, and not otherwise.

The decree of the circuit court must be reversed, and the bill of complaint dismissed.

THE GENERAL RULE IS, THAT A RIPARIAN PROPRIETOR has no right to corrupt the water to the injury of others: *McCullum v. Germantown Water Co.*, 54 Pa. St. 40; 93 Am. Dec. 656. But the rule is qualified to the extent of allowing the upper owner to use the stream for reasonable purposes, even to the extent of carrying off waste matter: *Ferguson v. Firmenich Mfg. Co.*, 77 Iowa, 576; 14 Am. St. Rep. 319. The latter case also lays down the principle that the reasonableness of the use must be determined by the given circumstances, and from the nature of the problem it is perhaps impossible to obtain a more precise definition of the privileges of the upper owner in this respect. It is, however, generally agreed that any artificial use which deprives the lower proprietor of the benefit of the water is unlawful, and on this ground, the pollution of streams by factories and mines is always restrained. See the cases above cited, and in regard to the coal-mines, *Sanderason v. Penn. Coal Co.*, 86 Pa. St. 401; 27 Am. Rep. 711; and the recent case of *Lents v. Carnegie Brothers*, 145 Pa. St. 612; 27 Am. St. Rep. 717.

THE PRINCIPAL CASE appears to rest upon the theory that the use of the stream complained of was a reasonable use for purposes of pasturage. The fact that the stock were not gathered together in such a way as to accumulate an unusual amount of filth distinguishes the case from *Hanselme v. Case*, 46 Wis. 391, 32 Am. Rep. 715, in which it was held that a lower riparian owner might recover for the pollution of the stream by a hog-yard. It would certainly appear proper that agriculturists and stock-raisers should be as liable for unreasonable contamination of waters as persons engaged in any other industry. Nearly two hundred years ago it was decided in an oft-cited English case that "a man must keep his filth in his own yard": *Tenant v. Goldwin*, 1 Salk. 360; and there seems no reason for relieving him of his liability because he injures his neighbor by discharging the filth into a stream instead of allowing it to escape upon his land directly. The language of the judge in the principal case seems almost to claim for tillage and stock-raising a special privilege, but his words should, we think, be qualified by a reference to the circumstances under review.

POLLUTION OF STREAMS BY SURFACE DRAINAGE FROM STREETS does not afford a cause of action against a city to an owner lower down the stream: *Bainard v. Newton*, 154 Mass. 255.

COMPENSATION TO RIPARIAN OWNER. — As the right to the use of the water is property, the riparian owner is entitled to compensation if that right is interfered with: See *Cooper v. Williams*, 4 Ohio, 253; 27 Am. Dec. 745.

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## RIVERDALE PARK COMPANY v. WESTCOTT.

[74 MARYLAND, 211.]

**EASEMENTS—RIGHT OF MILL-OWNER TO RESTORE DAM.** — When the owner of a mill and of the land sustaining a dam which supplies the water-power for the mill grants the mill, together with the mill seat and all water rights appertaining thereto, the grantee has a right to restore the dam afterwards washed away by freshet, although the land on which it is situated has been conveyed to other parties. In restoring the dam, he may connect it with the bank higher up the stream than it was formerly, if this is rendered necessary by the freshet; and he may build the re-



stored dam higher than the old one, so long as he does not thereby increase the water-power to which he was entitled at the time of his grant, although the effect of such restoration is to overflow more than formerly the land on which the dam is situated.

**EASEMENTS — RIGHT OF MILL-OWNER TO REBUILD DAM — IMPROVED MACHINERY.** — When the owner of a mill, mill site, and the water rights thereto appertaining is entitled to rebuild a dam for furnishing him with power, situated on the land of another, his right to restore the dam to its original power is not affected by the introduction of new and improved machinery in the mill, so long as the quantity of water used is not thereby increased.

**EASEMENT — DESTRUCTION OF MILL-DAM — INJUNCTION.** — When the owner of a mill, mill site, and the water rights thereto appertaining is entitled, as against the owner of the land on which the mill dam destroyed by freshet is situated, to rebuild such dam to its original capacity, he may obtain an injunction restraining such owner from destroying the restored dam, although the effect of the restoration of the dam is to overflow more than formerly the land on which it is situated.

*Frank Browning and Richard B. B. Chew*, for the appellant.

*Charles T. Westcott and Marion Duckett*, for the appellee.

**ROBINSON, J.** The appellee is the owner of a grist and flour mill operated by water, supplied from a dam built across the eastern branch of the Potomac River, and conveyed to the mill by means of a race. The mill and the land on both sides of the race and dam belonged originally to George B. Calvert. In 1859 Calvert sold and conveyed the mill and ten acres of land adjoining, "together with all the buildings, water-power, appertaining or belonging to said mill seat, to George W. Taylor, under whom the appellee claims.

In 1887, — nearly thirty years after the Taylor grant, — the heirs of Calvert sold and conveyed the land on both sides of the race and dam to one Lutz, under whom the appellant claims. The land thus conveyed to Lutz, and by Lutz to the defendant, has been laid off as a site for a town, and streets and avenues have been opened and graded, and sewers constructed for the drainage of the same, one of which empties into the mill-race of the appellee.

The dam by which the mill was supplied with water was washed away by the great freshet of 1889, and the plaintiff having built a new dam, the defendant, by its agents and servants, attempted to tear down and destroy part of said dam, to prevent which an injunction was granted by the court below. The new dam, the defendant contends, is not built on the site of the old dam, its west end connecting with the bank higher up the stream. Besides, it is higher, it is said, than the old

dam, thereby increasing the quantity and volume of water, and causing it to overflow the mouth of the sewer which empties into the race, to the great damage of the appellant.

The record is quite a large one, containing the testimony of no less than thirty witnesses, all of whom were examined, cross-examined, and re-examined at great, and it seems to us rather unnecessary, length. The real question, however, is a narrow one, and one, too, about which there cannot be, it seems to us, any difficulty. The rights of the parties to this controversy depend solely upon the construction of the deed from Calvert to Taylor, by which he conveyed to the grantee the mill and all the water rights appertaining or thereto belonging. So not only the mill, but all its water rights and privileges, thereby including the dam and the race, with the right to maintain a headway of water sufficient to operate the mill, with the capacity it had at the time of the grant, and which the proof shows to have been fifty barrels of flour a day, all passed under the Calvert deed to Taylor, and to those claiming under him. By the erection of the mill Calvert himself imposed a burden on one part of his estate in favor of the other, and when he conveyed the mill and water rights to Taylor, the latter, as to such water rights and privileges, became the dominant owner, and the owner of the land along the race became the servient owner. As to this there can be no controversy. But the appellant's contention is, that in rebuilding the dam the appellee has extended its west end higher up the stream, and that the dam itself is higher than the old dam.

Without attempting to review the somewhat conflicting testimony in regard to the appellant's contention, it is sufficient to say that it establishes beyond controversy that the west end of the dam does in fact extend and connect with the bank higher up the stream than the old dam. But this, it appears, was absolutely necessary by reason of the washing away of the west bank of the stream. The same freshet that washed away the dam washed away also the west bank of the stream, and it became necessary, therefore, to extend the west end of the new dam higher up, in order to connect it with the bank of the stream. As matter of fact, the record shows that during the forty years since the execution of the Calvert deed, the successive owners of this mill property have been obliged, in rebuilding the dam, to extend its west end farther up the stream in consequence of the washing away of the west bank.

And this was done without objection on the part of Calvert, the grantor, or his heirs, thus showing the construction of the parties themselves as to the water rights of the owners of the mill property. The dam is absolutely necessary to supply the mill with water, and if it is washed away by storms and freshets, the right of the owner of the mill to rebuild it is not, and cannot be, questioned. And if, by reason of the washing away of the west bank of the stream, it is no longer practicable to connect the new dam with the bank at the precise point at which the old dam connected, he has, it is equally clear, the right to extend the west end of the dam higher up the stream, until he finds a suitable place to make the necessary connection. To deny this right would be to deprive the owner of the mill of the water rights absolutely necessary to the beneficial enjoyment of the mill property. To impose upon him the burden of building a stone wall in the place of the bank thus washed away, as was suggested in argument, would be a most unreasonable construction as to his water rights and privileges under the Calvert deed.

Passing, then, from this objection to the dam because of its location, we come to the objection which was urged with so much force, as to the height of the dam. Upon this point, too, there is a good deal of conflicting testimony. But conceding, for the purposes of this case, that it is somewhat higher than the old dam, it cannot be said that the mere height of the dam itself affects injuriously the rights of the appellant. The proof shows that the bed of the stream has been somewhat changed and deepened by recurring freshets; and if this be so, the dam must be built higher in order to get the same surface level of water to supply the race, for the race, after all, supplies the necessary headway of water for operating the mill. By increasing the height of the dam the appellee has no right, we agree, thereby to increase the quantity or volume of water beyond the quantity or volume of water used by the mill at the time of the Calvert grant. And this seems to us to be the real question in this case. And as to this question the appellant has wholly failed in proving that either the quantity or volume of water has been increased by the erection of the present dam. All the witnesses agree that the forebay of the race is the absolute test or measure as to the quantity of water used in operating the mill, and they all agree that the forebay is in the same place, with the same width and depth, and that it does not and cannot now draw any more water

than it did when Calvert himself owned the mill. And further than this, the proof shows that this mill, with a capacity of fifty barrels of flour a day, has now, with the present dam, a headway of water barely sufficient to grind thirty barrels, and that, with a less headway of water, it would be impossible to operate the mill at all. If this be so, then there is an end of this controversy, for no one can question the right of the appellee to maintain a dam of a height sufficient to supply the water necessary to operate the mill according to its capacity at the time of the grant.

A good deal was said about the substitution of a turbine wheel for the old overshot wheel, and the change from a burr mill to a roller mill. But these changes in the machinery of the mill do not affect the question, for the reason that the proof shows that the quantity of water used by the mill has not been thereby increased. And so long as the appellee does not increase the quantity or volume of water, it cannot be said that he has imposed an additional burden upon the servient estate. And though the water in the race may overflow the mouth of the sewer which enters into it, and though the back water may overflow to some extent the adjoining land, these are injuries resulting necessarily from the beneficial enjoyment of the water rights and privileges to which the appellee is entitled under the Calvert deed. If this be so, there can be no question as to the right of the appellee to the writ of injunction. The dam was absolutely necessary to supply the water to operate the mill, and its destruction meant the destruction of the beneficial enjoyment of the mill itself. An action at law would not, under such circumstances, afford an adequate remedy. If the dam was rebuilt, the appellant might again destroy it, and there would be no end to this litigation. An injunction restraining the appellant from tearing away or destroying the dam was therefore a proper remedy.

Decree affirmed.

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**REAL ESTATE SUBJECT TO AN EASEMENT** is, in the hands of a purchaser, presumed to be burdened with such easement, where there is no stipulation to the contrary; and a purchase and conveyance of the part in favor of which an easement exists vests in the purchaser the right to insist on the continuance of such easement, whether his conveyance contains any express grant or not: *Zell v. Universalist Soc.*, 119 Pa. St. 390; 4 Am. St. Rep. 654. See also note to *Kutz v. McKune*, 99 Am. Dec. 89; and *Strickler v. Todd*, 10 Serg. & R. 63; 13 Am. Dec. 649.

**A PERSON HAVING THE RIGHT TO USE A CERTAIN QUANTITY OF WATER IN A STREAM** for mill purposes may change the mode and place of using it, pre-

vided the quantity used is not increased, and the change does not prejudice the rights of others: *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 454; 32 Am. Dec. 382. The height at which the water was kept at the time of the purchase of a mill privilege is ordinarily the measure of the purchaser's rights: *Taylor v. Hampton*, 4 McCord, 96; 17 Am. Dec. 710. But where one who is the owner of a mill and dam, and also of land above flowed by such dam, sells the mill with all its privileges and appurtenances, he cannot afterwards compel the grantee to compensate him for the injury caused by such flowing, and such grantee would have the right to continue such dam so as to raise the same head of water as the grantor had been accustomed to raise before the grant: *Hathorn v. Stinson*, 10 Me. 224; 25 Am. Dec. 228. Perhaps the general rule might be stated thus: The grant of mill privileges confers on the grantee, as against the land-owner and his grantees, the right to maintain a dam of sufficient height to produce the original water-power, even though this results in the flooding of a larger area of the land belonging to the grantor, but will confer no such right against the adjacent riparian proprietors. But though this rule appears to be the basis of the decision just cited and of the principal case, it can scarcely be supposed that it would be rigidly adhered to under all circumstances. Probably an implied qualification would be that the additional flowage should be reasonable. It would be going rather far to hold that if the flooding caused by the new dam in the principal case had been so great as to cover the whole of the adjacent tract, the mill-owner would still have a right to erect it. Yet such seems to be the logical result of the decision, unless the principle which appears to underlie it is limited in some way. The fact that the new and the old dam are of the same height will not protect the mill-owner, if the water is backed up farther by the new one: *Stafford v. Maddox*, 87 Ga. 537. The question always is, what height of dam is necessary to obtain the same water-power, and not whether the two dams are equal in height.

**IMPROVED MACHINERY.**—In the recent case of *Shearer v. Middleton*, 88 Mich. 622, it was held that evidence showing the introduction of new machinery after the building of a new dam was incompetent and misleading, where the issue was merely whether the dam had been so raised as to increase the flowage on the adjacent land.

**A RIPARIAN OWNER** is protected against the flowing back of water upon his land by the acts of another, by the common law, and may enter upon adjoining land to remove the obstruction, if he cannot otherwise obtain relief: *Heath v. Williams*, 25 Me. 209; 43 Am. Dec. 265.

**JURISDICTION OF EQUITY TO PREVENT MULTIPLICITY OF SUITS.**—Owner of realty is entitled to equitable aid to prevent permanent and continually recurring injuries: *Koopman v. Blodgett*, 70 Mich. 610; 14 Am. St. Rep. 527.

**THE POWER OF EQUITY TO INTERFERE, WHERE LEGAL REMEDY IS INADEQUATE**, is clearly set forth in the recent case of *Freeholders v. Newark Nat. Bank*, 48 N. J. Eq. 51, where it is said that to justify the court in declining jurisdiction, it must appear that the remedy at law is neither doubtful nor obscure, and will also correct the whole mischief, and secure to the person asking relief his whole right in a perfect manner. The objection to the interference of equity may be taken by demurrer: *Kelley v. Kelley*, 80 Wis. 486.

## SOUTHERLAND v. NORRIS.

(74 MARYLAND, 323.)

**ELECTIONS—QUALIFICATION OF VOTER—VESTED RIGHTS—RULE OF EVIDENCE.—REGISTRATION.**—The right of an elector to have his qualifications to vote determined by existing rules of evidence is not a vested right, and is at all times subject to regulation by statute, so long as his constitutional rights are not thereby invaded, and he is not precluded from presenting them to the proper forum for determination. The forum for the determination of this question is the office of registration of voters.

**ELECTION—QUALIFICATION OF VOTER—RESIDENCE—RULE OF EVIDENCE.**—Whether or not a person is entitled to vote in a particular place where he is not actually domiciled is a question depending to some extent upon his intention to make that place his legal residence, and a statute which adds no qualification of any kind, but simply makes provision for proving in a particular and definite way what that intention is, invades no constitutional rights and is valid.

**ELECTIONS—QUALIFICATION OF VOTER—RULE OF EVIDENCE AS TO RESIDENCE.**—A statute which adds no qualification to a voter except to provide that all persons whose names are registered, but who have removed from the state and have acquired a new domicile elsewhere at the time of the passage of the act, shall be conclusively presumed to have permanently removed from the state, unless the person who has so removed rebuts that presumption by making a prescribed affidavit of intention to return and permanently reside within the state, and by subsequently returning, simply provides a rule of evidence for the proof of legal residence, and invades no constitutional nor legal right of a voter who has removed from the state previous to its enactment, and who is in the employ of the United States government in another state or country.

**ELECTION—QUALIFICATION OF VOTER.—STATUTORY RULE OF EVIDENCE** in force at the time a voter's qualifications as an elector is to be decided or determined, and not that in force when that question first arose, must control the admissibility and effect of evidence applicable thereto, when no constitutional or legal right of the voter is invaded.

*A. Posey and Frederick Stone, for the appellant.*

*F. M. Cox and John Prentiss Poe, for the appellees.*

**McSHERRY, J.** George E. B. Key was born in Charles County, and resided there continuously until the summer or fall of 1889, when, having been employed as a laborer in the navy-yard at Washington, he removed to the District of Columbia, and shortly thereafter took his family to reside with him in that place. He rented a house in Washington, and gave up the one he had occupied in Charles County. He has remained in the employ of the United States government nearly ever since, and during that period he returned to Charles County only to make some brief visits. When he left

the county his name appeared upon the registration books of the first election district as a qualified voter, but during the sitting of October, 1890, the officer of registration struck his name from the registry lists, and thereupon the appellant, alleging that he, Southerland, felt himself grieved by this action of the officer of registration, took an appeal to the circuit court for Charles County, for the purpose of having Key's name restored to the lists. The petition was dismissed, and from that ruling of the court this appeal has been taken.

The qualifications of a voter in this state are prescribed by the first section of article 1 of the constitution of Maryland. Those qualifications are, that he shall be a citizen of the United States of the age of twenty-one years or upwards, and that he shall have been a resident of the state for one year, and of the legislative district of Baltimore city, or of the county in which he offers to vote, for six months next preceding the election at which he offers to vote. Before he can exercise his right to vote he must be duly registered. These qualifications, fixed by the organic law, can neither be enlarged nor curtailed by the general assembly; but there is no provision of the constitution, as there is no principle of constitutional law, that denies to the legislature the power to enact rules of evidence by which the facts establishing the right to vote may be proved. The constitution itself merely designates the qualifications, and then leaves the legislature free to declare by what evidence those qualifications must be shown to exist. It is perfectly competent to the legislature to say what shall and what shall not be admissible evidence to prove a particular fact; and this it has repeatedly done. Its power to change an established rule of evidence is equally undoubted; and the adoption by it of a new rule, whereby the proof of a fact is rendered more difficult than it had been before, invades, on that account, no vested right whatever. The right to have one's controversies determined by existing rules of evidence is not a vested right. These rules, like others affecting remedies, must at all times be subject to modification and control by the legislature: *Gibbs v. Gale*, 7 Md. 76; *Ogden v. Saunders*, 12 Wheat. 349; *Webb v. Den*, 17 How. 576. But the general assembly has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights: *Cooley on Constitutional Limitations*, 453. These general principles are applicable

when the matter to be proved is the voter's qualification, and the forum is the limited one of an officer of registration, no less than when a disputed right is investigated in a judicial tribunal possessing original jurisdiction.

The legal residence of Key is the controverted question in the case at bar, and was the question before the officer of registration. Now, what evidence has the general assembly declared shall alone be competent, both before the officer of registration and in the courts upon appeal from him, to prove residence in cases where the voter had left the state before the passage of the act of 1890, chapter 573? Prior to the adoption of that act there was no rule of evidence prescribed by the legislature on this subject, and in dealing with such questions resort was of necessity had by the courts to general principles and analogies. By section 14 of the act of 1890, chapter 573, it is provided, in substance, that all persons whose names were upon the registration lists at the date of the passage of the act, but who had previously removed from the state and had taken up a domicile, dwelling-place, abode, or habitation beyond the limits of Maryland, shall be presumed to have thereby intended to abandon their legal residence in this state, unless within thirty days after the passage of the act they shall go in person before the clerk of the circuit court for the county from which they shall have so removed, or before the clerk of the superior court of Baltimore city, if their removal shall have been from said city, and make and acknowledge before such clerk an affidavit that when they so removed, they did not intend to change their legal residence within the state, but that they intend to return to this state, and to take up their actual domicile and habitation therein, on or before six months next preceding the Tuesday after the first Monday of November, 1890. In addition to making the oath, the persons were required to return to the state conformably to the intention expressed in the affidavit. A failure to make the oath, and to observe it, was declared to be a conclusive presumption of an abandonment of residence in Maryland. By section 39 B, it is enacted that upon appeal from an officer of registration no declarations, statements, or admissions of a person seeking registration shall be admissible in evidence to prove with what intention he came to, remained in, or departed from any place of abode. Key did not make the affidavit prescribed by the statute, nor did he return to Charles County six months next before the election held in November, 1890. Confessedly, therefore, he



has not done the things which the statute required him to do to prove his right to vote. But it is insisted that he is still entitled to vote, because,—1. Section 14, to which we have just referred, is unconstitutional; and 2. Because, if it be not unconstitutional, it has no application to him by reason of his being in the employ of the federal government.

It is argued that the section is unconstitutional in consequence of its requiring him and others similarly situated to possess qualifications in addition to and beyond those prescribed by the constitution; and further, because Key having departed from the state prior to the passage of the act, its provisions cannot alter or change his right to vote, or to register, or to have his name remain on the registration list, as that right existed and was recognized by the law in force at the date of his removal to the District of Columbia. The section in question does not purport to, and does not in fact, add anything to the qualifications of age and residence as they are fixed in the constitution. It deals exclusively with the evidence by which one of those qualifications—that of residence—shall be proved, just as it might have done with regard to the proof of age. Whether a person is entitled to vote in a particular place where he is not actually domiciled is a question depending, to some extent, upon his intention to make that place his legal residence; and the act of assembly, whilst superadding no qualification of any kind, simply makes provision for proving, in a definite and particular way, what that intention is. Before the section was enacted, a mere removal by a voter from the state, if that removal was in pursuance of a fixed intention to return, did not deprive him of his right to vote in Maryland: *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107. This is the law to-day. Before the act of 1890, chapter 573, a removal from the state, accompanied by no circumstances to indicate an intention to return, furnished some evidence of an intention to acquire a new residence elsewhere, upon the principle that the place where a person lives is taken to be his domicile until facts adduced established the contrary: *Anderson v. Watt*, 138 U. S. 694; *Mitchell v. United States*, 21 Wall. 350. Since that act, such a removal, together with the acquisition of a new domicile, is given more weight as evidence of an intention to abandon the state,—its probative force is strengthened. It now raises a presumption that the removal was made with an intention of being permanent, unless the person who has so removed rebuts that presumption by mak-

ing, within a designated time, the affidavit prescribed by the statute, and by subsequently returning to the state. The section, therefore, merely changes the old rule of evidence, and substitutes a new and uniform one in its stead. It adds no qualification, but simply provides a rule of evidence for the proof of a legal residence. And this the legislature had the undoubted right to do, notwithstanding Key had left the state before the statute was passed. When he left, his name could have been stricken from the registry lists, though the act of 1890 had never been passed, if his removal had been accompanied by circumstances indicating a purpose or intention on his part to abandon the state. But when he left, with the rules of evidence thus defined, he did not take with him a vested right that those rules should not be changed. He had no guaranty under the constitution or laws that the legislature could not, if in its wisdom expedient, give to that removal a greater value as evidence of intention than it formerly possessed, provided the legislature did not thereby altogether preclude him from exercising his right to vote. And this, it is perfectly apparent, has not been done. In other words, his right to vote in the election of 1890 depended on his right to have his name appear on the registration lists as the name of a qualified voter; his right to have his name so appear at that time depended on his being then a resident of the state and of Charles County; and the mode of proving that residence depended, not on the rules of evidence in force when he left the state, but upon those in force when the officer of registration sat in October, 1890, to revise the registry lists.

The rules of evidence in force at the time a controverted question is to be decided or determined, and not those which obtained when that question or controversy arose, are the rules which must govern and control the admissibility and effect of evidence applicable thereto. For instance, a statute which removed the disqualification of interest, and allowed parties in suits to testify, may lawfully apply to existing causes of action: *Rich v. Flanders*, 39 N. H. 304; *Southwick v. Southwick*, 49 N. Y. 510. So may a statute which modifies the common-law rule excluding parol evidence to vary the terms of a written contract: *Gibbs v. Gale*, 7 Md. 76. Indeed, the legislature "may prescribe the number of witnesses which shall be necessary to establish a fact in court, and may again at pleasure modify or repeal such law, and so they may prescribe what shall be and what shall not be evidence of a fact, whether it

be in writing or oral; and it makes no difference whether it be in reference to contracts existing at the time or prospectively": *Fales v. Wadsworth*, 23 Me. 553. And as observed in *Ogden v. Saunders*, 12 Wheat. 849, the legislature may prescribe the evidence which may be received, and declare the effect of that evidence.

The establishment of this new rule of evidence consequently violated no vested right of Key or of other persons similarly situated. The requirement that the affidavit shall be made within a limited time is not an unreasonable condition, — certainly not so unreasonable as to render the statute in this particular either oppressive or invalid.

There is nothing in the letter or the spirit of the statute to justify the conclusion that its terms do not apply to employees of the federal government. Because an individual who leaves the state, and takes up a domicile elsewhere, happens to be in the service of the general government, he is not exempted from the operation of a rule of evidence which upon its face applies to all persons who depart from the state and acquire a residence beyond its limits. We have no authority to import into the statute an exception which we do not find there, — to write into it, by judicial construction, a qualification of its meaning, and a restriction of its scope, when nothing contained in the body of the act will justify it. The language is plain and unambiguous, and does not admit of the construction contended for. A clause exempting officers of the general government from the operation of this section was incorporated in the bill before the senate of Maryland, but was stricken out by that branch of the legislature. We know of no principle which will authorize this court to restore it.

We think the court was right in rejecting the prayers of the appellant, and in dismissing his petition, and its judgment will therefore be affirmed.

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PROPER AND REASONABLE REGISTRATION LAWS are valid, not as imposing upon the elector an additional and necessary qualification created by statute, but as a method of proving the existence of the qualifications required by the constitution: *State v. Corner*, 22 Neb. 265; 3 Am. St. Rep. 267; *State v. Scarborough*, 110 N. C. 232. See the subject discussed at length in the note to *Capen v. Foster*, 23 Am. Dec. 642-651, and additional cases cited in the note to *Blair v. Ridgely*, 97 Am. Dec. 266.

THE LEGISLATURE HAS POWER TO PRESCRIBE THE FORM and nature of the proof by which unregistered electors must establish the existence of a right to vote under the constitution: *Cusick's Election*, 136 Pa. St. 459; but cannot prescribe a method of giving such proof which conflicts with the constitu-

tion by adding what is, in effect, a property qualification: *Morris v. Powell*, 125 Ind. 281. The same case holds that a statutory provision requiring residents of the state who absent themselves from the state for six months or more, or persons who have not resided in one county for six months before any election, to register and produce a certificate of registration ninety days before the election, was void, both because it lengthened the period of residence exacted by the constitution, and because it was in conflict with a clause of the constitution prohibiting by implication the legislature from imposing the necessity of registration upon only a part of the voters. As this provision was construed with special reference to the constitution of the state, and the question of the power of the legislature to lay down new rules of evidence for the purpose of testing the qualifications of voters was not raised, the decision is not inconsistent with that of the principal case. The case of *Lancaster v. Herbert*, 74 Md. 334, decides that while a failure to make and acknowledge the required affidavit is conclusive evidence of an intent to abandon a residence in the state, the making of such affidavit is not conclusive evidence of a contrary intention, and that the question of residence is still open for investigation.

AS TO THE GENERAL POWER OF THE LEGISLATURE to change and modify remedies and prescribe rules of evidence, see *Richardson v. Cook*, 37 Vt. 599; 88 Am. Dec. 622; *Stephenson v. Osborne*, 41 Miss. 119; 90 Am. Dec. 358; *Hope Mutual Ins. Co. v. Flynn*, 38 Mo. 433; 90 Am. Dec. 438. Compare also the more recent cases, *Maguiar v. Henry*, 84 Ky. 1; 4 Am. St. Rep. 182; *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 438. The subject is also discussed in the note to *Morse v. Gould*, 62 Am. Dec. 112, 113.

## ARCHER v. STATE.

[74 MARYLAND, 442.]

**OFFICERS — QUALIFICATION — CONSTITUTION — MANDATORY PROVISIONS.** — A constitutional provision that a person appointed to the office of state treasurer shall qualify by taking the constitutional oath of office within one month after his appointment, and that if he refuses or neglects to do so within that period of time, such refusal or neglect shall operate as a refusal to accept the office, and a new appointment must be made, is mandatory and not merely directory.

**OFFICERS — QUALIFICATION — OFFICIAL BOND — MANDATORY PROVISIONS OF CONSTITUTION.** — When the plain mandate of the state constitution is that the person appointed to the office of state treasurer shall qualify by taking the constitutional oath of office within one month after his appointment, the failure of the person appointed to such office to take such oath, or file his official bond until more than a year after his appointment, will prevent him from being legally inducted into office, and no action can be maintained on his official bond, filed and approved at the time he attempted to take the oath of office.

**OFFICERS — QUALIFICATION — OFFICIAL BOND — LIABILITY OF SURETIES.** — The official bond of a public officer does not make the sureties thereon responsible for the discharge of any duties by him except those that become incumbent upon him by his appointment or election and a due

qualification thereunder; and when he has failed to qualify as required by the constitution or laws, the bond never becomes effective, and no action will lie thereon.

**OFFICERS — QUALIFICATION — OFFICIAL BOND — LIABILITY OF SURETIES. —**

When a person legally appointed to a public office for a certain term, and until his successor is appointed and qualified, has duly qualified under such appointment, and is subsequently reappointed upon the expiration of his first term to succeed himself, but fails to qualify under his second appointment, and is never legally inducted into office thereunder, his official bond filed under the second appointment is of no effect, and the sureties are not liable thereon. In such case the doctrine of estoppel and of voluntary official bonds has no application against the sureties.

**OFFICERS — VOLUNTARY OFFICIAL BONDS — LIABILITY OF SURETIES. —**

A voluntary official bond can only be enforced against the sureties therein, when, by virtue of the execution and delivery of such bond, the principal therein has been inducted into office, and has become possessed of the things appertaining thereto. In such case the sureties, having by their act enabled their principal to obtain the office, are estopped to deny their liability for his official acts.

**OFFICERS — OFFICIAL BOND — LIABILITY OF SURETIES. —** When an official bond is executed and delivered by sureties to their principal, they thereby clothe him with authority to deliver it, for the purposes for which it was executed; but they give him no authority to deliver it for any other purpose than that which its terms show that it was intended to serve.

*Edgar H. Gans, Albert Constable, and Bernard Carter, for the appellants.*

*John Prentiss Poe and William Pinkney Whyte, attorney-general, for the appellee.*

MILLER, J. We have just decided in the preceding case that under the clause of the constitution which declares that the term of office of the treasurer "shall be for two years, and until his successor shall qualify," Archer's term of office, under his first appointment in January, 1886, commenced from the time of his due qualification under that appointment on the 2d of February, 1886, and continued until the due qualification of his successor. He was appointed by the legislature his own successor on the 13th of January, 1888, but failed and neglected to take the oath of office, and failed and neglected to give an official bond, under that appointment, until the 18th of November, 1889. On that day he attempted to do both these things. He took the oath of office before the governor, and the latter approved the bond, which was presented, and this is the bond which is sued on in the present case. The main question presented by the rulings excepted to is, Was the qualification on that day of any effect whatever? or in

other words, can any suit be maintained on this second bond? This depends, in the first place and mainly, upon the construction and effect of several clauses of the constitution.

Article 6, section 5, declares that "the treasurer shall qualify within one month after his appointment by the legislature." Article 1, section 6, provides that "every person elected or appointed to any office of profit or trust under this constitution, or under the laws made pursuant thereto, shall, before he enters upon the duties of such office, take and subscribe the following oath or affirmation." Then the oath is set out, and the following section (section 7) declares that "every person hereafter elected or appointed to office in this state who shall refuse or neglect to take the oath or affirmation provided for in the sixth section of this article shall be considered as having refused to accept the said office, and a new election or appointment shall be made, as in case of refusal to accept or resignation of an office." Taking this oath is what is meant by the terms "qualifying" and "qualification," as used in the constitution. But in the case of the treasurer, the constitution provides that he shall also "take such oath, and enter into such bond for the faithful discharge of his duties, as are now or may hereafter be prescribed by law" (article 6, section 1), and the statute law has provided that in addition to the oath prescribed by the sixth section of the first article of the constitution, he shall take an oath faithfully, diligently and honestly to discharge the duties of his office; and then declares that before entering upon the discharge of his duties, he shall give bond to the state, with security or securities approved by the governor, in the penalty of two hundred thousand dollars, with condition that he will truly and faithfully discharge, execute, and perform all and singular the duties required, and which may be required of him by the constitution and laws: Code, art. 95, secs. 1, 2. In order, therefore, to induct a treasurer into office, and enable him to enter upon the discharge of his duties, he must,—1. Be appointed by the legislature; 2. He must qualify within one month after his appointment, and take both the constitutional and statutory oath; and 3. He must give the required bond.

It is with one only of these requirements that we are now particularly concerned. The plain mandate of the constitution is, that a person appointed by the legislature to the office of treasurer shall qualify by taking the constitutional oath of office within one month after his appointment, and with equal

explicitness, it is declared that if he refuses or neglects to do so within that period of time, such refusal or neglect shall operate as a refusal to accept the office, and a new appointment must be made, as if he had, by affirmative words, declined or refused to accept it. We are unable to give these clauses of the constitution any other interpretation. We cannot treat them as merely directory, and not mandatory. Not only is the language of the constitution too plain to admit of doubt, but the great weight of authority is against a directory construction of them. As said by Judge Cooley: "Courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of government must at all times shade their conduct. . . . We are not, therefore, to expect to find in a constitution provisions which the people in adopting it have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given for any other end; especially, as has already been said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication": Cooley on Constitutional Limitations, 8d ed., 78, 79. This is the view sustained by the decided weight of judicial authority throughout the country. The decisions in this state applicable to the subject and to the same effect are *Harwood v. Marshall*, 9 Md.

103, and *County Commissioners v. Meekins*, 50 Md. 45. We cannot regard the case of *McPherson v. Leonard*, 29 Md. 377, as a controlling authority the other way. Two of the five judges by whom that case was decided dissented, and it has not been followed in any subsequent decision. Here the constitution deals with the important office of state treasurer. Its mandates are directed, not to formalities, but to essentials, and if they can be overlooked and disregarded, where can we find anything in the constitution that it is to be obeyed?

If, then, we are right in adopting this construction of these constitutional provisions, it follows that Archer's attempt to qualify in November, 1889, by then taking the constitutional oath of office under his appointment in January, 1888, was of no effect. He had no right then to take the oath, and the governor had no authority to administer it to him. There is no power given to the legislature, or to the governor, or to any one else, to condone the failure to qualify within the prescribed time. The appointment did not of itself confer the office, and entitle him to assume its duties and responsibilities; qualification within the limited period was an essential prerequisite to that: *Thomas v. Owens*, 4 Md. 220. Nor could the qualification in November, 1889, relate back to his appointment in January, 1888, for that proposition is expressly repudiated in the case just cited: *Thomas v. Owens*, 4 Md. 220. After the expiration of a month from his appointment in January, 1888, nothing but a new appointment, followed by a due qualification, could interrupt his holding the office under his first appointment and qualification, in January, 1886. He therefore held the office after November, 1889, just as he held it before that time, and continued so to hold it until his third appointment, and due qualification thereunder, in January, 1890.

The approval of the bond by the governor in November, 1889, was equally ineffectual to make it a binding obligation upon the sureties. It is familiar law that the contract of a surety upon an official bond is subject to the strictest interpretation. They undertake, in the language of Judge Cooley, "for nothing which is not within the strict letter of their contract. The obligation is *strictissimi juris*; and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent": *Mecham on Public Offices and Officers*, sec. 282; *United States v. Boyd*, 15 Pet. 187; *Gunther v. State*, 31 Md. 29. This bond



was executed by all the sureties, save one, on the 27th of January, 1888, before the expiration of a month from the date of his appointment, on the 13th. It recites that he was duly appointed treasurer on the 13th of January, 1888, pursuant to the provisions of the constitution of the state, and the laws thereof, and is conditioned for the faithful discharge of all the duties required of him by the constitution and laws in all things pertaining to his office. This is the contract into which the sureties entered. It must be read in connection with the provisions of the constitution to which it refers, and on its face is plainly a contract to be responsible for the faithful discharge of his duties, provided he validly entered into office under the appointment of January 13, 1888, in pursuance of the requirements of the constitution. It would be doing violence to its terms if the contract could be read as making the sureties responsible for the discharge of any duties save those that became incumbent upon him by that appointment, and a due qualification thereunder. Where the language of the contract is thus plain, it is scarcely necessary to cite authorities, but we refer to *Union Bank of Maryland v. Ridgely*, 1 Har. & G. 324, *State v. Wayman*, 2 Gill & J. 279, *Bruce v. State*, 11 Gill & J. 386, *United States v. Le Baron*, 19 How. 77, as abundantly sustaining the position. Entry under the constitution and laws, upon the office under that appointment, was an indispensable prerequisite to the coming into effect and operation of this bond, and as he never duly qualified under that appointment, this bond never became operative. Therefore the approval of it by the governor in November, 1889, could not make it binding upon the sureties.

But it has been argued, that though it may not be good as a statutory bond, still, upon the principle of estoppel and of voluntary bonds, the sureties are liable in this action. We cannot, however, accept that doctrine as applicable to this case. We have already shown that this bond was intended to be a statutory official bond, and nothing else. But apart from this, what is this doctrine of voluntary official bonds? The foundation on which rests the validity of what are known as voluntary official bonds is, that by virtue of the execution and lawful delivery of the bond, the principal has been inducted into office, and become possessed of the things appertaining thereto, and in such case it is held that the surety having by his act enabled the principal to obtain the office, he is estopped to deny his liability for the official acts of the officer: *Mechem*

on Public Offices and Officers, sec. 271; Brandt on Suretyship, sec. 445. But that is not the case here. This instrument on its face declares to all the world that it was given for securing the faithful discharge of his duties by Stevenson Archer, as a legally constituted treasurer under his appointment of the 13th of January, 1888, and we have shown he never became such. It is true that where a bond is executed by sureties, and delivered by them to their principal, they thereby clothe him with authority to deliver it for the purpose for which it was executed; but they give him no authority to deliver it for any other purpose than that which its terms show it was intended to serve. This bond bore date the 27th of January, 1888, and the record shows that the sureties had nothing to do with having it presented to the governor for approval in November, 1889, when, according to the plain mandates of the constitution, it was impossible for Archer to qualify. There was therefore no valid delivery of the bond to the state as the obligee. Again, nothing was done on the faith of the approval of this bond, and nobody was injured or deceived by it. The state's money and securities did not come into Archer's possession by reason of this bond. He was then in office *de jure* under his first appointment and qualification in January, 1886, and the state was protected by his first bond then given. That first bond continued in force and was operative as long as the term of office under his first appointment and qualification continued, and we have said that this continued until the due qualification of his successor (that is, himself) under his third appointment in January, 1890. This is not, therefore, a case in which the doctrine of estoppel or of voluntary bonds applies.

The case has been argued with great ability on both sides, and these are the conclusions we have reached, after giving it our best consideration. Several of the rulings excepted to are in conflict with these views, and we need not specify them in detail. For these errors the judgment will be reversed, and as we have decided no action can be maintained on the bond, a new trial will not be granted.

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THE LIABILITY OF SURETIES ON SUCCESSIVE BONDS is discussed in the extended note to *Crown v. Commonwealth*, 10 Am. St. Rep. 843-860.

WHERE A STATUTE REQUIRES AN APPOINTEE TO TAKE AN OATH OF OFFICE, he cannot be considered as qualified unless he takes such oath: *Johnston v. Wilson*, 2 N. H. 202; 9 Am. Dec. 50. Such a statute is mandatory: *People v. Perkins*, 85 Cal. 509.

**SURETY ON AN OFFICIAL BOND** has the right to stand on the very terms of his contract: *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609; and is not answerable for defaults of his principal occurring before the delivery of the bond: *People v. Van Ness*, 79 Cal. 85; 12 Am. St. Rep. 134; or its execution: *State v. Finn*, 98 Mo. 532; 14 Am. St. Rep. 654.

**DELIVERY OF OFFICIAL BOND.** — Official bond is not regarded as delivered prior to its approval by the proper officer: *People v. Van Ness*, 79 Cal. 85; 12 Am. St. Rep. 134. But the failure of the proper officers to approve it will not invalidate it, nor release the sureties from their liability thereon: *People v. Huson*, 78 Cal. 154.

**VOLUNTARY BONDS.** — That a bond void as a statutory official bond may be good as a common-law bond, see *Stephens v. Crawford*, 1 Ga. 574; 44 Am. Dec. 680, and note. As to enforcement of bond given to release property under attachment, which fails to take effect as a statutory bond, see *Bunne-man v. Wagner*, 16 Or. 433; 6 Am. St. Rep. 306.

## LONG v. STATE.

[74 MARYLAND, 565.]

**LOTTERY — GIFT-ENTERPRISE — CONSTITUTIONAL LAW.** — A statute providing that "no person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell, trade, or to offer for barter, sale, or trade, by any publication, or in any way, any wares, goods, or merchandise of any description, in package or bulk, holding out as an inducement for any such barter, sale, or trade, or offer of the same, any scheme or device by way of gift-enterprises of any kind or character whatsoever," includes all gift-enterprises, whether involving the element of chance or not, and is unconstitutional and void, so far as it relates to such enterprises not involving the element of chance.

**LOTTERY — GIFT-ENTERPRISE — CONSTITUTIONAL LAW.** — A statute which declares in effect that no person shall give away anything to a purchaser of goods, wares, or merchandise as an inducement to make the purchase is unconstitutional and void, as an oppressive and burdensome regulation of trade, not necessary to the health, safety, nor welfare of the people.

*Benjamin Kurtz*, for the appellant.

*William Pinkney Whyte*, attorney-general, for the appellee.

**FOWLER, J.** The plaintiff in error, Calvin Long, was indicted in the criminal court of Baltimore, for violating the act of assembly of 1886, chapter 480, which has been codified as section 185 of article 27 of the code, and which reads as follows: "No person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell, trade, or to offer for barter, sale, or trade, by any publication, or in any way, any wares, goods, or merchandise of any description, in package or bulk, holding out as an inducement for any such

barter, sale, or trade, or the offer of the same, any scheme or devise by way of gift-enterprises of any kind or character whatsoever."

The indictment contained two counts, — the first charging that the said Long unlawfully sold certain merchandise, holding out as an inducement for such sale a certain scheme and device, by way of gift-enterprise; and the second, that he kept a certain place or house for the purpose of selling lottery tickets. At the trial the state abandoned the second count, relating to the sale of lottery tickets, and elected to stand upon the first count. The plaintiff in error then demurred to the indictment, upon the ground that the act of assembly of 1886, chapter 480, codified as above mentioned, upon which the first count is based, is void. This demurrer was overruled, and having been duly tried and convicted, said Long appealed to this court from the rulings of the criminal court as to the admissibility of certain testimony: *Long v. State*, 73 Md. 527; 25 Am. St. Rep. 606. We affirmed the ruling of the lower court, and remanded the case for further proceedings. A final judgment having been entered, a writ of error was sued out, assigning a number of errors. All of them, however, present the same question, namely, whether the act referred to is a valid exercise of legislative power.

This is the only question here presented. It was not before us on the former appeal, for we then assumed that the act was valid. The legislation we are considering is one of a class of laws which have been enacted in almost all the states, in order, if possible, to prevent lotteries and gambling from entering into the ordinary transactions of life. We find many cases, some of them being referred to by the attorney-general in his brief, illustrating the necessity of such laws to restrain the introduction into mercantile transactions of lottery schemes and gambling devices like the one the plaintiff in error used in his business. We said on the former appeal that such a device had not even the merit of originality, and it undoubtedly violates the provisions of our code prohibiting lotteries, "and all devices and contrivances designed to evade" said provisions. The ingenuity and fertility of invention which has been exercised in efforts to evade such laws would, no doubt, win success in legitimate lines of business.

It would unduly prolong this opinion to review the many cases referred to upon the briefs. All of those relied upon by the state are cases in which there was an indictment under

the laws prohibiting lotteries, and in which it was held the several devices or contrivances adopted involved chance. The case of *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, is the one chiefly relied upon by the plaintiff in error. We will consider it presently.

In *Hull v. Ruggles*, 56 N. Y. 424, the exigency of the case required the court to determine and define what is a lottery, and they laid down this definition: "Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to have for it, that is a lottery." Worcester's definition is: "A game of hazard, in which small sums are ventured for the chance of obtaining greater value." And the definition adopted by the state in this case is not materially different from the above: "Any scheme for the distribution of prizes by lot, or which one on paying money to another obtains a token, which entitles him to receive a larger value or nothing as some formula of chance may determine, is a lottery." In one respect we think all of these definitions are too narrow to cover some of the modern devices resorted to in order to evade the lottery laws, and that whether the consideration paid or given for the token or chance to win something, generally called a "prize," consists of money or any other thing of value makes no difference.

An examination of the many cases on this subject will show that it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery or gaming laws in force in the various states of the Union.

In the case of *Yellow-Stone Kit v. State*, 88 Ala. 196, 16 Am. St. Rep. 38 (1888), the court uses this language: "If the distribution is a pure gift or bounty, and not in name or pretense merely, which is designed to evade the law, — if it be entirely unsupported by any valuable consideration moving from the taker, — there is nothing in this mode of conferring it which is violative of the policy of our statutes condemning lotteries or gaming."

It is apparent, however, that the giving away of property without consideration, whether by lot or otherwise, is not in itself an evil, and certainly not such an evil as requires prohibition by law at the present day.

The case referred to — that of *People v. Gillson*, 109 N. Y.

389, 4 Am. St. Rep. 465, decided by the court of appeals of New York in 1888 — arose upon the question of the validity of an act of the legislature of that state, which provided that "no person shall sell, exchange, or dispose of any article of food, or offer or attempt to do so, upon any representation, advertisement, notice, or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is or is to be delivered or received . . . as a gift, prize, premium, or reward to the purchaser." It was held that "by the provisions of this act, a man owning articles of food which he wishes to sell or dispose of is limited in his powers of sale or disposition. A liberty to adopt or follow for a livelihood a lawful industrial pursuit, and in a manner not injurious to the community, is certainly infringed upon, limited, perhaps weakened or destroyed, by such legislation."

"This law," says the New York court, "interferes with the free sale of food; for the condition is imposed that no one shall sell food, and at the same time, and as part of the transaction, give away any other thing."

These remarks apply with great force to our own act, which prohibits, as we have seen, in connection with any sale of goods, wares, or merchandise, "any scheme or device by way of gift-enterprises of any kind or character whatsoever."

This broad and sweeping language would seem to include not only a lottery in which a valuable consideration is given for the chance to win a prize, but also a gratuitous distribution not involving the element of chance. The words "gift-enterprises," so far as we have ascertained, have never been judicially defined.

The Century Dictionary gives the only definition of the words we have been able to discover, as follows: "A business, as the selling of books or works of art, the publication of a newspaper, etc., in which presents are given to purchasers as an inducement."

It was contended on the part of the state that the act of 1886 comes within the legitimate exercise of the police power, and that "gift-enterprises" is a species of lottery, because the distribution in all gift-enterprises is dependent on some formula of chance. But we do not think the words "gift-enterprise" necessarily imply a scheme involving chance. In so far as the object of an act is to protect the morals and advance the welfare of the people by prohibiting every scheme and device bearing any semblance to lottery or gambling, it undoubt-

edly would be a valid exercise of power, and the citation of authorities is not necessary to sustain a proposition so well settled.

But the act in question goes further, and in effect, as we construe it, declares, as did the New York statute, which was held invalid in the case referred to, that no person shall give away anything to a purchaser of goods, wares, or merchandise, as an inducement to make the purchase.

Such a regulation of trade is, in our opinion, not only unwise, but unlawful, and unlawful because it is necessary neither for the health, safety, nor welfare of the people, and which in its operation would be oppressive and burdensome: *People v. Gilson*, 109 N. Y. 389; 4 Am. St. Rep. 485; *Matter of Application of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 686; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Toledo etc. R'y Co. v. City of Jacksonville*, 67 Ill. 40; 16 Am. Rep. 611.

It must always be conceded, of course, that the state can, through its legislature, by the legitimate exercise of its police powers, pass "laws and regulations necessary for the protection of the health, morals, and safety of society": *Singer v. State*, 72 Md. 466; yet such regulations must be reasonable, and "what are reasonable regulations, and what are subjects of police power, must be necessarily judicial questions": *Toledo etc. R'y Co. v. City of Jacksonville*, 67 Ill. 40; 16 Am. Rep. 611.

It follows that the act of 1886, chapter 480, by reason of its general terms, including as it does all gift-enterprises, those involving the element of chance as well as those that do not, is invalid so far as it relates to gift-enterprises not involving chance, and that the judgment of the criminal court of Baltimore must be reversed.

Judgment reversed and cause remanded.

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LOTTERIES are discussed in the extended note to *Yellow-Stone Mt. v. State*, 88 Ala. 196; 16 Am. St. Rep. 38. It is the selling and disposing of chances for money for a chance of receiving more, and not the drawing of the chances, that constitutes the lottery: *People v. Elliott*, 74 Mich. 264; 16 Am. St. Rep. 640; *State v. Boncil*, 42 La. Ann. 1110; 21 Am. St. Rep. 413; *State v. Kansas Mercantile Association*, 45 Kan. 351; 23 Am. St. Rep. 727.

STATUTE PROHIBITING ANY PERSON WHO SELLS, exchanges, or disposes of any article of food from offering to give or giving some other article as a gift, prize, premium, or reward to the purchaser, infringes upon the liberty of the seller, and is unconstitutional and void: *People v. Gilson*, 109 N. Y. 389; 4 Am. St. Rep. 485.

CASES  
IN THE  
SUPREME COURT  
OF  
MICHIGAN.

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TALBOT v. KUHN.

[89 MICHIGAN, 80.]

**JUSTICE'S JUDGMENT, DOCKET ENTRY OF, ADMISSIBLE IN EVIDENCE, WHEN. —**

The docket entry of a judgment of a justice of the peace is admissible in evidence, although such entry does not show that the justice waited one hour after the return hour within which to allow the defendant to appear.

**JURISDICTION OF JUSTICE NOT LOST BY FAILING TO WAIT FOR DEFENDANT'S APPEARANCE. —** Where a justice of the peace has acquired jurisdiction of the defendant by due service of process, he does not lose it by failing to wait one hour after the time stated in the process for the defendant's appearance before rendering judgment against him. The defendant's remedy for such an irregularity is by timely application to the proper court to have the judgment reversed.

**ASSUMPSIT.** The opinion states the case.

*J. G. Dickinson*, for the appellants.

*Walter Barlow*, for the defendant.

**CHAMPLIN, C. J.** The record in this case shows that the suit was brought before a justice of the peace; that the declaration was in *assumpsit* on all the common counts, and specially on a certain judgment rendered by Felix A. Lempke, a justice of the peace for Wayne County, May 21, 1885, for the sum of \$121.89 damages and \$1.50 costs, which said judgment was removed by transcript to the circuit court, June 14, 1887, the same being file No 1,596 in said circuit court. The plea was the general issue, and the result a judgment for defendant.

The plaintiffs appealed to the circuit court, and to maintain the issue on their part, offered in evidence the original docket entry of the judgment, as follows: —



"Justice's Docket. F. A. Lempke, Justice of the Peace.

"Liber 2, page 134.

"No. 930.

"William H. Talbot,  
Henry D. Wilmarth,  
Charles N. Wilkins,  
George W. Wheaton,  
Newell Sturtevant, Copartners  
doing business as Talbot, Wilmarth,  
& Co., Non-residents,

v.

Franz Kuhn.

*Assumpsit.*  
J. G. Dickinson,  
Attorney for plaintiffs.  
John Promsteller,  
Constable.

"1885.

"May 18. Summons issued, returnable before me May 21,  
at 9 A. M.

"May 18. Summons returned personally served by Con-  
stable Promsteller.

"May 21, 9 A. M. Case called, plaintiffs in the court. Plain-  
tiffs declare an action of *assumpsit* upon all the common counts,  
and claim damages in three hundred dollars (\$300) or under.

"Defendant does not appear. Julian G. Dickinson sworn  
in behalf of the plaintiffs, and proves his authority to appear.  
I thereupon render judgment in favor of the plaintiffs, and  
against the defendant, for the sum of one hundred and twenty-  
one dollars and sixty-nine cents (\$121.69) damages and \$1.50  
costs.

"FELIX A. LEMPKE,

"Justice of the Peace."

The defendant objected to the introduction of the docket in  
evidence, for the reason that it does not show that the justice  
waited one hour after the return hour in the writ within which  
to allow the defendant to appear. The court sustained the ob-  
jection, and excluded the docket. Plaintiffs offering no fur-  
ther proofs, the court directed a verdict for defendant.

The only error assigned in this court is the exclusion of the  
docket introduced to prove the judgment, on the ground that  
such docket entries do not show that the justice waited one  
hour after the return hour in the writ within which to allow  
the defendant to appear.

There is no statute requiring the justice to wait one hour for  
the defendant to appear. Section 6915 of Howell's Statutes  
provides that "whenever a defendant who has been personally  
served with a summons, attachment, or writ of replevin, or  
who shall have procured an adjournment without having

joined issue, shall neglect to appear and join issue, the justice shall proceed to hear the proofs and allegations of the plaintiff, and determine the same as above prescribed."

Sections 6869 and 6870 provide that the party may appear in person or by attorney, and if by attorney, his authority so to appear shall be proved in all cases where the opposite party shall not appear.

Section 6938 provides that judgment of nonsuit shall be entered against the plaintiff for failure to appear on the return of process within one hour after the same was returnable. This provision, by judicial construction of the statute, has extended the same privilege to the defendant: *Bossence v. Jones*, 46 Mich. 492. But it is a privilege, and not a jurisdictional requirement, as to the defendant, and must be taken advantage of by seeking a correction of the irregularity in the same suit by special appeal or *certiorari*: *Smith v. Brown*, 34 Mich. 455; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104. On the other hand, the statute expressly requiring the justice to render a judgment of nonsuit against the plaintiff who fails to appear within the hour, he loses jurisdiction at the expiration of that time if the plaintiff fails to appear. The docket must show that the plaintiff appeared within the time in order to show that the justice retained jurisdiction: *Redman v. White*, 25 Mich. 526; *Brady v. Taber*, 29 Mich. 199; *Mudge v. Yaples*, 58 Mich. 309; *Post v. Harper*, 61 Mich. 434; *Wedel v. Green*, 70 Mich. 642. Having acquired jurisdiction of the defendant by due service of process, the justice did not lose jurisdiction by not waiting one hour after the time stated in the process for his appearance. If he proceeded within that time, and took a "snap judgment," the defendant could, by timely application to the proper court, have had it reversed for this irregularity.

As no other objection was raised, either in the court below or by the assignment of errors, none will be noticed.

The judgment is reversed, and a new trial ordered.

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**JUSTICE OF THE PEACE.** — A justice of the peace summons being made returnable at ten o'clock, A. M., and the defendant failing to appear at that hour, the justice, before rendering judgment by default, must wait one hour: *Seartes v. Averhoff*, 28 Neb. 668. See also *Downer v. Hollister*, 14 N. H. 122; 40 Am. Dec. 175, and note 177, 178, on the subject of the time for appearance in justice's courts.

**EVIDENCE.** — As to the effect of docket entries of a justice of the peace as evidence, see *Hickey v. Hinsdale*, 8 Mich. 267; 77 Am. Dec. 450, and note.

## CITY OF GRAND RAPIDS v. POWERS.

[80 MICHIGAN, 94.]

**WATERCOURSES—DOCK-LINES CANNOT BE ESTABLISHED IN, WITHOUT NOTICE TO RIPARIAN OWNERS.**—The legislature cannot confer upon the board of public works of a city power and authority to establish dock and building lines on the margin of a river at a place within the corporate limits, where the river is not navigable for any purpose, without giving to the riparian owners notice and an opportunity to be heard.

**RIPIARIAN PROPRIETOR OWNS TO MIDDLE OF NAVIGABLE STREAM IN MICHIGAN.**—In Michigan the riparian proprietor on a navigable stream owns to the middle of the stream, and has the right to use his land which is covered by water in any way he chooses, provided he does not seriously injure the public use of the stream, or obstruct or impede navigation, or damage other riparian proprietors along the stream above or below him.

**FLOATABLE STREAM—RIPIARIAN OWNER'S RIGHTS IN.**—The riparian proprietor on a stream which is only capable of being used for the floating of lumber and logs in rafts or single pieces is entitled to the beneficial and sole use of such stream; and when such stream has become unfitted for valuable public use, and has actually ceased to be used for a public highway, there is no more reason for holding it to be public than in the case of a land highway which has been abandoned and is useless.

**LEGISLATURE CANNOT MAKE THAT A PURPRESTURE OR NUISANCE WHICH IS NOT SO IN FACT.**—The legislature cannot authorize a municipality to make that a purpresture or nuisance which is not so in fact, if by so doing the constitutional rights of any citizen in his person or property are destroyed or infringed.

**NON-NAVIGABLE STREAM—RIPIARIAN PROPRIETOR'S RIGHT IN.**—A riparian proprietor on a stream not navigable in fact may construct therein, in front of his land, anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to the use of the waters for hydraulic purposes. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the constitution, and it cannot be taken, or its value lessened or impaired, even for public use, without compensation, or without due process of law, and it cannot be taken at all for any one's private use.

**BILL for an injunction.** The opinion states the case.

*William Wisner Taylor and Edwin F. Uhl*, for the complainant.

*Blair, Kingsley, and Kleinhans*, for the defendant.

**MORSE, J.** Grand River is one of the largest and most important inland streams of the state. It is a navigable river. It has been a water highway, upon which for many years logs and lumber have been floated from the pineries to the lake at Grand Haven, or to mills at various points upon the river bank. It has never been navigable for boats, except canoes and *bateaux*, above Lyons, and no steam-boats have been above

the rapids at Grand Rapids for many years. Small steam-boats have run between the mouth and the city of Grand Rapids, and with the aid of government appropriations, the river below the rapids at that city may be a water-way of great commercial utility; but above the rapids it has nearly served its usefulness as a navigable stream, except for small pleasure-boats. The running of logs, lumber, and timber upon it is no longer of consequence, on account of the exhaustion of the forest supply of easy access to it and its tributaries. But it will ever be an important public stream, and its navigability for pleasure is as sacred in the eye of the law as its navigability for any other purpose. Its waters empty into Lake Michigan, and from thence flow into the St. Lawrence and to the sea; and under the ordinance of 1787, as well as the laws of our state, it must be regarded in the main as a public river and a common highway. It passes through the city of Grand Rapids, dividing the place into two parts, known as the "East" and "West" sides. The "Rapids" take up within the city limits about two miles of the river. The fall of the river-bed is such that the water, in the natural state of the river, flowed with such velocity at a shallow depth, among numerous rocks and bowlders, over these rapids, as entirely to prevent any navigation, except with canoes; and it was always with great difficulty that one of these could be poled up the stream. The character of the underlying soil of the river here is rocky,—ledge rock between the dam and Bridge Street, and below that it is composed of clay, bowlders, and gravel, with ledges of rock occasionally cropping out. There never has been a steam-boat up or down these rapids but once, and then it had to be drawn up by oxen, horses, and Indians. Logs could never well be floated down without improvements of the channel. The rapids, in a state of nature, served no useful end in any kind or method of navigation. Upon the east bank of the river, and below the dam, extensive encroachments have been made by property owners, the first beginning of such encroachments dating back many years, and almost from the first settlement of the country; and made lands and buildings upon them, of the value of millions of dollars, are now located in the old river-bed upon that side.

The defendant, Williams T. Powers, in 1886, was the owner of the west bank of the river from a point above the present dam down to the point below the Grand Rapids and Indiana railroad bridge. The river near by and within the city limits

is spanned by eight bridges, in the following order, from the north to the south: The Detroit, Grand Haven, and Milwaukee railway bridge, Leonard Street bridge, Sixth Street bridge, Bridge Street bridge, Pearl Street bridge, Grand Rapids and Indiana railroad bridge, Fulton Street bridge, and Chicago and West Michigan railway bridge. Five of these are maintained by the city. None of these, except the last, have any draw or openings for the passage of boats, and they are comparatively low bridges, with their supporting piers resting upon the bed of the river. In 1866 and 1867, Powers, in connection with other riparian owners, and with municipal and legislative consent, built a dam across the river. This dam is about 650 feet in length, and about 7 feet in height. A chute was put in to accommodate and facilitate the running of logs over the dam. Powers, at the same time and in connection with this dam, built a canal along the line of his lands, upon the west side, which is about two thirds of a mile in length. Part of it was built in the natural ground, and part encroached upon the shallow waters of the original stream. The water of this canal is about nine feet deep, and varies in width from fifty to one hundred feet. This improvement is worth many thousands of dollars.

In 1885 the legislature, by act No. 292 of the Local Laws of that year, amended the charter of Grand Rapids, conferred power and authority on the board of public works of the said city of Grand Rapids to establish dock and building lines on the shores and margin of Grand River within the corporate limits of said city, and in the waters and on the bed of said river along the said shores and margin, beyond which said lines, when so established, no dock, wharf, building, or structure of any kind, except public bridges, should be constructed in said river, or on or over the bed thereof, nor should the water be in any manner obstructed beyond said established lines; and authorized the common council of said city to enforce the power thus granted, relating to the establishment of such lines, by ordinances duly enacted in that regard, and authorized said common council to impose appropriate penalties for that purpose within the limits prescribed by said charter of said city; and also provided that the ordinances or regulations of said common council, in relation to said dock-lines, might be enforced at the suit of said city by bill in equity. Afterwards, acting under this authority, the board of public works of said city, on the third day of May, 1886, estab-

lished a dock and building line on the shores and margin of said Grand River within the corporate limits. On the twenty-sixth day of July, 1886, the common council of said city passed an ordinance entitled "An ordinance to prohibit and prevent the erection of buildings, docks, and other structures, and to prohibit and prevent the filling in of earth or other material on the shores of Grand River, or obstructing the waters of Grand River, beyond the dock and building lines established by the board of public works," which was afterwards amended on the thirtieth day of January, 1888. This ordinance prohibited any encroachment upon the river shore or bed of any kind outside of the established dock-lines. These dock-lines were established by the board of public works without notice to Mr. Powers or any of the riparian owners along such lines; nor does it appear that they were consulted in regard to the location of such lines.

After the establishment of these dock-lines, Mr. Powers commenced the building of a wall in the stream. The wall was built of stone, and about four feet wide; and the defendant admits that he has constructed said wall to about the following dimensions: "Commencing at or near the southerly end of the waste-weir of the West-side Canal, so called, in said city, near the dam across said Grand River; thence extending southeasterly sixty-six feet, more or less, to a point just about forty-five feet east of the said pretended dock and building line so pretended to be established by the board of public works; thence extending southerly on a line which, if extended, would meet the public bridge over said Grand River at East Bridge Street, in said city, at a point about thirty feet east of said pretended dock and building line."

He also admits that he intends to build said wall from the dam to Bridge Street, and for his own purposes, and that the same is, and will be, outside the said dock-lines.

The city of Grand Rapids files its bill of complaint in the superior court of Grand Rapids, in chancery, basing its right for relief upon the legislative act aforesaid, and the action of the board of public works and the common council, under the authority given these bodies by such act, and claiming,—1. That the structure is unlawful by reason of such act, and the proceedings under it; 2. That such wall is of great damage and detriment to the public use of the stream, as it would greatly narrow the natural channel, and impede the flow of the waters therein, and in times of high water would cause the

waters of the river to be held back, and overflow and flood various portions of the city and its public streets, thereby causing great public and private damage, and occasion sickness to the inhabitants of the city, by causing the ground thus overflowed to be damp and foul; 3. That it will interfere with the public use of the river, and its value for the purposes of commerce, for the floating of vessels, boats, rafts, and logs.

The bill prays that the defendant may be temporarily, and also permanently, enjoined from building the wall, or any other wall, outside of the said dock-lines, and that he be decreed to remove said stone wall by him constructed.

The defendant, answering, avers that by virtue of his riparian rights, he owns the soil and bed of Grand River to the center thereof; that he has a right to make such use of the bed of said stream within his own ownership as he sees fit, provided only that he does not interfere with the public use of said stream for the purposes of navigation, or with the rights of other riparian owners upon its banks; and denies that this wall so built, or as it is intended to be constructed, interferes at all with the public use of said river, or with the rights of other riparian owners; and further avers that the same, when completed, will be a benefit rather than a damage to the public and all concerned.

It is admitted that under the settled law of this state the defendant is the owner, by virtue of his riparian rights, of the soil of the river-bed to the middle of the stream. It must also be conceded that he would have a right to build this wall, and to reclaim, for his own use, the land between it and the old west shore of the river, if such building of the wall and reclamation of the land did not interfere with the public right of navigation, or the private right of other owners of the river bank, had it not been for the act of the legislature in question, and the subsequent proceedings of the authorities of the city of Grand Rapids, under and by virtue of such act. The ordinance of 1787 cuts no particular figure in this case, because, under the decisions of the federal courts, as far as the general government is concerned, the rights of riparian owners on the streams mentioned or embraced by said ordinance must be determined according to the law of the state within which they are situated: *St. Louis v. Myers*, 113 U. S. 586; *Barney v. Keokuk*, 94 U. S. 324; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1. Grand River must be treated the same as any other navigable stream, under the laws of our state, in the solution

of this question, having regard, however, to its character as a stream, considered at the point towards which this legislation is directed, and where the rights involved are located. In the court below, the city seems to have rested its case entirely upon the validity of this dock-line legislation, and proceedings taken under it, and no particular effort was made to show that the wall was, or would be, injurious to either public or private rights.

The dock-line, as established, cannot be sustained, for two reasons:—

1. The persons owning the banks of the river in fee-simple, and having absolute property in the river-bed, subject only to the public right of navigation, were not notified of the proposed action of the board of public works, and had no hearing upon the establishment of these dock-lines. The fixing of these lines was an *ex parte* and arbitrary proceeding, involving the rights of property owners, upon which they have never had a day in court. Whatever may be held to be the authority of the legislature in respect to establishing such lines, it cannot certainly be done without notice to property owners, and opportunity of a hearing accorded to them. This would be despotism, and without due process of law. No man's rights can be submitted, under a constitutional government, to the discretion of any one without notice or hearing: *Robison v. Miner*, 68 Mich. 549; *In re Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310.

2. The dock-line, as established, encroached upon the shoreline of defendant, and the ordinance of the common council, therefore, prohibits him from building upon and occupying his own land which has never been covered with water. The testimony of the city engineer, Mr. Collar, a witness for the complainant, shows, on cross-examination, that the dock-line on the west side of the river in many places runs upon and along the east edge of the top surface of Mr. Powers's canal bank for some distance. At some points it is nine feet, and at others more, west from the water-line of the river at ordinary stages, and at the south end of the canal the dock-line cuts off a strip of mainland of some feet in width, and a part of the mainland shore of the river. This dock-line, as fixed, runs through buildings, and cuts off a part of the Crescent mills, which have been built more than twenty years, and passes through other buildings. It must be held that the legislature has no power to extend dock-lines upon the natural shore or bank of the river, or to authorize the municipality to forbid the owners from building upon such shore or bank. This would be tak-



ing private property for public use without compensation, which is forbidden by our constitution.

For these reasons alone, the bill in this case must be dismissed, as there is nowhere in the evidence any showing that the building of the wall will be of any damage to the public use of the river for the purposes of navigation, or any injury in any way to the rights of the public or of private persons.

But the question of grave concern remains, to wit: What are the rights of the defendant as a riparian owner in this river? and what control can the municipality, under authority of the legislature, lawfully exercise over such rights? And it seems to me desirable that this question be settled, as it is conceded to be an open one, so far as the courts of this state are concerned, and one of great moment to the public as well as to private interests. In examining this question, we must remember that the riparian proprietor in this state holds a different and more extended title to the soil under the water of a navigable stream than he does in many of the states of the Union. In this state he owns the soil to the middle of the stream, and has the right to use his land which is covered by water in any way he chooses, provided that he does not seriously injure the public use of the stream, or obstruct or impede navigation, or damage other riparian owners along the stream above or below him.

"Any erection which can lawfully be made in the water within those lines belongs to the riparian estate. And the complete control of the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large, to the navigation, and such other use, if any, as appertains to the public over the water. . . . In those waters whose beds are public and not private property, erections by riparian owners are unlawful, not because they are nuisances in the proper sense of the term, but because they are encroachments on the public domain, and they are as unauthorized as would be the erection of houses or barns upon public land away from the water by an adjoining land-holder. But where the ownership is private, and the public rights are simply easements or privileges upon it, the owner may do what he pleases, so long as he does not injuriously affect the public enjoyment. On land, where roads are laid out of a prescribed width, the law or the authorities having determined that width to be desirable, the right to encroach upon the way cannot be very extensive.

But where the way exists in a watercourse, whose boundaries are variable, and laid down without human intervention, the extent to which private improvements are compatible with the public use must depend upon circumstances, and must always be a question of fact. The owner's use is lawful until shown to be unlawful. It is plain enough that there are streams which cannot safely be encroached upon at all, while there are others so considerable that they could not be appreciably injured by a very extensive system of dockage or other erections in their beds": *Ryan v. Brown*, 18 Mich. 196, 207; 100 Am. Dec. 154. See further, as to the ownership and rights of the riparian owner in the bed of streams, *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435; *Rice v. Ruddiman*, 10 Mich. 125; *Watson v. Peters*, 26 Mich. 508; *Richardson v. Prentiss*, 48 Mich. 88; *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 466; *Pere Marquette Boom Co. v. Adams*, 44 Mich. 403; *Backus v. Detroit*, 49 Mich. 110; 43 Am. Rep. 447; *Fletcher v. Thunder Bay R. Boom Co.*, 51 Mich. 277; *Webber v. Pere Marquette Boom Co.*, 62 Mich. 626; *Turner v. Holland*, 65 Mich. 453; *Attorney-General v. Evart Booming Co.*, 34 Mich. 463.

It is contended by the counsel for the complainant that the legislature of this state has the constitutional right to confer upon the proper authorities of the city of Grand Rapids the authority to establish dock and building lines on the shores and margin of Grand River, and that the defendant had no right to build a wall in the waters of the river beyond the dock and building line established by the board of public works; and to sustain this contention he cites the following: *Cooley on Constitutional Limitations*, 5th ed., 470, \*595; 1 *Dillon on Municipal Corporations*, 3d ed., 136, 107; *Hart v. Mayor*, 3 Paige, 218; 9 Wend. 571; 24 Am. Rep. 165; *Commonwealth v. Alger*, 7 Cush. 53; *People v. Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396, 398; 84 Am. Dec. 351; *Attorney-General v. Woods*, 108 Mass. 436; 11 Am. Rep. 380; *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182; *Attorney-General v. Boston etc. R. R. Co.*, 118 Mass. 345; *State v. Sargent*, 45 Conn. 358. *Cooley* says: "Wharf-lines may also be established for the general good, even though they prevent the owners of water-fronts from building out on soil which constitutes private property." And in the same connection adds: "And the legislature may prevent the removal of stones, gravel, or sand from the beach for the protection of harbors. This is said to be a just re-

straint of an injurious use of property which the legislature have authority to impose": Cooley on Constitutional Limitations, 6th ed., 739.

This language is plainly used in reference to wharves and and harbors upon navigable water, and for the purposes of navigation by boats and vessels.

Dillon says: "The rights of riparian proprietors in respect to the erection of wharves are subject to such reasonable limitations and restraints as the legislature may think it necessary and expedient to impose. Therefore it is competent for the legislature to pass acts establishing harbor and dock lines, and to take away the rights of the proprietors to build wharves on their own land beyond the lines, even when such wharves would be no actual injury to navigation": 1 Dillon on Municipal Corporations, 8d ed., sec. 107.

This language has also evidently the same application.

In *State v. Sargent*, 45 Conn. 858, the owner of the land took title only to high-water mark. The fee between high and low water mark was in the state, in trust for the public. It was held that the owner of the shore might construct wharves upon the soil below high-water mark, but in so doing must conform to the regulations of the state; and it is said that the duty of protecting the paramount right of navigation rests upon the legislature, and they are to determine for themselves by what methods and instruments they will discharge it. It is further said that the enactment of laws restraining proprietors of the shore from extending wharves or other structures into navigable waters is not the exercise of eminent domain. The public do not appropriate or use any right of the land-owner in the soil of the shore. This is no doubt good law where the land-owner's possessions stop at high-water mark, but it does not apply to the case before us.

The New York cases cited also refer to cases where the land-owner had no fee in the land under water; *Hart v. Mayor*, 8 Paige, 213; 9 Wend. 571; 24 Am. Dec. 165, involving rights upon the banks of the Albany Basin, which was a work of the state, and created by it. In *People v. Vanderbilt*, 26 N. Y. 287, the matter in controversy was the construction of a pier in New York harbor.

The case of *Commonwealth v. Alger*, 7 Cush. 53, deals with the establishment of harbor-lines in Boston harbor, and where, under the colonial ordinance of 1647, the proprietors of uplands bounded on the sea have an estate in fee in the adjoin-

ing flats above low-water mark, and within one hundred rods of the upland, with full power to erect wharves and other buildings thereon, subject, however, to the reasonable use of other individual proprietors and of the public for the purposes of navigation, and subject also to such restraints and limitations of the proprietors' use of them as the legislature may see fit to impose for the preservation of public and private rights. It was held that "the legislature of this commonwealth has power to establish lines in the harbor of Boston beyond which no wharf shall be extended or maintained, and to declare any wharf extended or maintained beyond such lines a public nuisance; and statutes establishing such lines take away the right of the proprietors of flats in the harbor beyond the lines to build wharves thereon, even when they would be no actual injury to navigation; and such statutes, although they provide for no compensation to such proprietors, are not unconstitutional, as taking private property and appropriating it to public uses without compensation, within the meaning of the declaration of rights, article 10, nor as impairing the operation of the grant made by the colonial ordinance, and thus transgressing the prohibition of the constitution of the United States (art. 1, sec. 10) against passing laws impairing the obligation of contracts. But such statutes do not affect the right to maintain wharves erected before their passage."

By examining the opinion in this case, it will be seen that the grants of land since the adoption of this ordinance, which vested, by virtue of it, an estate in fee in the land lying between high and low water mark, were also subject to the proviso that such estate should be used so as not to stop or hinder the passage of boats and vessels, etc., and subject to all such restraints and limitations of absolute dominion over it in its use and appropriation as other real estate is subject to for the security and benefit of other proprietors and of the public, in the enjoyment of their rights. The court justifies its opinion under the police power of the legislature,—the authority vested in that body to establish all manner of wholesome and reasonable laws, rules, and penalties, not repugnant to the constitution, as they shall judge to be for the good of the commonwealth and the subjects of the same,—and holds that the legislation in question is not an appropriation of property to a public use, "but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain."

This case is followed in the other Massachusetts cases cited.

The learned counsel also contends that language has been used in several of the opinions of our own court recognizing the right of the legislature to establish wharf and dock lines, but admits that the question in this case is still an open one, so far as this court is concerned. The cases in which this matter have been touched upon are:—

1. *Lorman v. Benson*, 8 Mich. 18; 77 Am. Dec. 435. In the course of the opinion Mr. Justice Campbell (p. 32) said: "It is urged that this ruling will interfere with the improvement of rivers, and disturb the title of islands. But these objections are not well taken. The public authorities can regulate water highways, as well as land highways, although the soil of neither belongs to the state."

2. *Rice v. Ruddiman*, 10 Mich. 126. Mr. Justice Christiancy in his opinion says, at page 141: "These principles, when applied to Muskegon Lake, can no more interfere with the public right of navigation than when applied to rivers. In both cases the ownership is equally qualified by and subordinate to the rights of the public. In fact, navigation is much more likely to be benefited than injured by the application of these principles. Wharves and other similar erections are essential to the interests of navigation; and if the bed of the lake to high or low water mark were vested in the state, no private owner could extend a wharf one foot from the water-line without becoming a trespasser, and incurring the risk of losing his improvements, though navigation might be aided, rather than injured, by it; while, by admitting the riparian ownership as above explained, individual enterprise is stimulated to improvement, and the public interest is subserved. The public, through their proper authorities, have always the right to restrain any encroachments which may be injurious to the public right, and to compel the removal of any obstruction or impediment, as well as to punish the offender, to the same extent as if the bed of the lake were vested in the state."

3. *Bay City Gas Light Co. v. Industrial Works*, 28 Mich. 182. In this case Mr. Justice Campbell says, at page 184: "The right of docking out, so as to secure the full benefit of the water-front, is limited by the rule that it must not seriously impair the right of navigation. In order to prevent any dispute as to what wharfing will be such an encroachment, it has been provided in some of our city charters that the city may fix a dock-line, beyond which such erections shall not extend.

In doing this the authorities are supposed to consult the public convenience, and to draw the line in such manner as to subserve this. It is usual, and practically almost necessary, to make the frontage thus defined follow straight lines of considerable length, avoiding angles as much as possible, and paying no attention to the sinuosities of the shore. Such lines will not necessarily or usually be exactly parallel with the shore or with the thread of the stream. They can have no bearing whatever upon the determination of boundaries, and are meant to determine at what line the depth of water will be found sufficient to meet all the necessities of navigation. So far as they are valid, it is as limits reasonably and impartially fixed, beyond which all are forbidden to wharf out, and within which every person may lawfully improve his own property. But with the ownership of property the city authorities have no concern."

4. *Lincoln v. Davis*, 53 Mich. 375; 51 Am. Rep. 116. On page 390 Mr. Justice Campbell says: "There can be no doubt of the right of the state to forbid any erections within such parts of the water as are strictly navigable, and to regulate the distance beyond which no private erections can be maintained."

Whatever may be the power of the legislature in waters "strictly navigable" to fix an arbitrary line beyond which riparian owners cannot go, or to delegate to a municipality that power, I am satisfied that no such right exists in the waters of Grand River at the rapids, or certainly in that part of the waters which are not now navigable for any purpose. The rights of the riparian owner, under our laws, are subject only to the public use for the purposes of navigation; and there is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless: See opinion of Campbell, J., *Sterling v. Jackson*, 69 Mich. 510; *Grand Rapids Booming Co. v. Jarvis*, 80 Mich. 308; *Mid-dleton v. Flat River Booming Co.*, 27 Mich. 533.

There is no pretense in the proofs in this case that this river in front of the land of the defendant has ever been, ever will be, or can be used for the navigation of commercial boats and vessels, nor that the water between the existing or proposed wall of the defendant and his shore-line has been, will be, or can be used even for the floating of logs or rafts. It has never been "strictly navigable" water. In order to get the logs and lumber that have gone over the chute in the dam down these rapids, it has been necessary for many years to clear out a channel in the center of the stream, and inclose such channel on each side with cribs and timbers, thus making an artificial canal, as it were, in the center of the stream for the purpose of floatage. This wall will have no appreciable effect upon this artificial channel, unless it be to deepen its waters, and thus aid navigation rather than to hinder it. This is the whole tendency of the proofs.

It is claimed by the counsel for complainant that the proposed occupation of the river-bed by the defendant will be a purpresture, and therefore a public nuisance, and that as such the legislature, or the city under authority from the legislature, may abate it whether it interferes with navigation or not. A "purpresture" is defined by Chief Justice Cooley in *Attorney-General v. Ewart Booming Co.*, 34 Mich. 472, as "an inclosure by a private party of a part of that which belongs to, and ought to be open and free to the enjoyment of, the public at large"; and he also holds that an unauthorized inclosure of a part of a water highway is as much a public wrong as that of a land highway. But he also, in the same case, defines the character of the Muskegon River as a navigable stream at the point in controversy in that case, and says: "Neither is it a navigable stream . . . in the more popular sense of that term, for it is only a small stream whose value to the public consists in the use which can be made of it for the purpose of floating logs and lumber."

Such is the navigability of the Grand River at the place in controversy here. He further says: "The right of floatage is unquestionably a right which the state should guard and protect; but it is a serious mistake to assume that the private appropriation of a part of the bed of the river would necessarily be either a purpresture or a nuisance. The property taken in such a case is not public but private property, and the owner of the bank, who also presumably owns to the center of the stream, may maintain trespass or ejectment against the

taker. If the owner make no complaint, the public can have neither right nor occasion for any, provided the navigable rights are not abridged. If they are, it is not very manifest how this can be a purpresture. The difference between the highway by land, with its definite limits to which the public right extends, whether the whole is used or not, and the highway for floatage in our small streams, where the public rights have no definite limitations of space except as practicability for use and the occasion for use may give variable limits, as the seasons and the needs of business and traffic may change, is so plain that the difference between an appropriation in the two cases needs only to be mentioned. It requires neither argument nor illustration. The one is a public grievance of some sort, but the other is no public grievance of any sort, unless the public use is unreasonably abridged or inconvenienced."

The police power of the legislature in this state is not omnipotent. It cannot, under the guise of regulation, destroy property rights arbitrarily and without reason. The legislature can, without doubt, in public harbors, and perhaps in navigable streams where boats and vessels can be and are used, limit the construction of wharves to the line of navigability; but it is doubtful if such erections could be stopped short of such lines unless some good reason could be shown for such a regulation: *Attorney-General v. Ewart Booming Co.*, 34 Mich. 472, 473. And "the extent to which private improvements are compatible with the public use must depend upon circumstances, and must always be a question of fact": *Ryan v. Brown*, 18 Mich. 209; 100 Am. Dec. 154. The legislature of Michigan cannot authorize a municipality to make that a purpresture or nuisance which is not so in fact, if, by so doing, the constitutional rights of any citizen in his person or property are destroyed or infringed: *Wreford v. People*, 14 Mich. 41; *Everett v. Marquette*, 53 Mich. 450; *In re Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310; *Robison v. Miner*, 68 Mich. 556; *People v. Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578.

The power of the legislature in the matter of harbor and dock lines upon streams where the bank-owner's title in fee reaches to the bed of the river, subject to the public use for purposes of navigation, came before the supreme court of the United States in *Yates v. Milwaukee*, 10 Wall. 497. Yates built a wharf over the low water in the Milwaukee River the width of his lot, and 190 feet in length, to reach navigable



water. The legislature of Wisconsin had authorized the common council of Milwaukee to establish, by ordinance, dock and wharf lines on this river, and to restrain and prevent encroachments and obstructions therein, and to cause it to be dredged. The city by ordinance declared this wharf to be an obstruction to navigation and a nuisance, and ordered it abated. Yates refused to abate it. Thereupon the city contracted with a person to remove it, and Yates filed his bill to restrain such removal. There was no evidence to show that the wharf was an actual obstruction to navigation, or was in any other sense a nuisance. The court, speaking through Mr. Justice Miller, said: "We are of the opinion that the city of Milwaukee cannot, by creating a mere artificial and imaginary dock-line hundreds of feet away from the navigated part of the river, and without making the river navigable up to that line, deprive riparian owners of the right to avail themselves of the advantage of the navigable channel by building wharves and docks to it for that purpose."

It is also further said that the riparian right in the bed of the stream "is property, and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

See also *Norfolk City v. Cooke*, 27 Gratt. 430, where it is held that the soil under water of the riparian proprietor is not a mere license or privilege, but is property,—property in the soil up to the line of navigability, though covered with water.

An interesting case, and one in point, is *City of Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123. The legislature of Wisconsin in 1887 passed an act "that it shall be unlawful and presumptively injurious . . . to persons and property to drive piles . . . in Rock River within the limits of the county of Rock, and the doing of any such act shall be enjoined at the suit of any resident tax-payer, without proof that any injury . . . has been or will be caused by reason of such act"; and further provided that such acts might be enjoined at the suit of any one having the use of the water-power of the river in said county, without other proof than that the act would cause the river or rise to set back to some extent at the place where the water used to operate his mill or factory is

discharged into the river. This would seem to have been the exercise of the police power of the legislature declaring certain specific things nuisances *per se*. But the Wisconsin supreme court holds that such legislation is void, and in violation of the constitution, in that it deprives the riparian owner of his property in the river without compensation and without due process of law. The court says: "This is the first time that any legislature of any enlightened country ever attempted to create an action without any cause of action; to authorize a complaint to be made to a court when there is nothing to complain of; to compel the courts to enjoin the lawful use and enjoyment of one's own property, 'without proof that any injury or danger has been or will be caused by reason of such act.'"

The court holds as follows in regard to the right of the person sought to be enjoined by the city under this act: "That Thomas Lappin, the owner in fee of this ground, has the right to use and enjoy it to the center of the river in any manner not injurious to others, and subject to the public right of navigation, has been too often decided by this court and other courts to be questioned. As a riparian owner of the land adjacent to the water, he owns the bed of the river *usque ad filum aque*, subject to the public easement, if it be navigable in fact, and with due regard to the rights of other riparian proprietors. He may construct docks, landing-places, piers, and wharves out to navigable waters if the river is navigable in fact; and if it is not so navigable, he may construct anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to use the waters for hydraulic purposes: *Jones v. Pettibone*, 2 Wis. 308; *Arnold v. Elmore*, 16 Wis. 509; *Yates v. Judd*, 18 Wis. 118; *Walker v. Sheperdson*, 4 Wis. 486; 65 Am. Dec. 324; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Delaplaine v. Chicago etc. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 237; *Hazeltine v. Case*, 46 Wis. 391; 32 Am. Rep. 715. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the constitution, and it cannot be taken, or its value lessened or impaired, even for public use, without compensation, or without due process of law, and it cannot be taken at all for any one's private use."

This, in my opinion, is the title also that the defendant Powers holds in the bed of Grand River opposite his shore-line,

and his rights are co-extensive with those given by the Wisconsin supreme court to Lappin; and that the law of this state is in complete accord and harmony with that of our sister state of Wisconsin in respect to riparian rights. See especially *Ryan v. Brown*, 18 Mich. 196; 100 Am. Dec. 154; *Attorney-General v. Evart Booming Co.*, 84 Mich. 462; *Sterling v. Jackson*, 69 Mich. 510-512, opinion of Campbell, J.; *Middleton v. Flat River Booming Co.*, 27 Mich. 533 (ann. ed.), and notes; *Watson v. Peters*, 26 Mich. 508 (ann. ed.), and cases cited in note 1; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Maxwell v. Bay City Bridge Co.*, 41 Mich. 466.

I do not pass upon the right of the legislature to empower the city of Grand Rapids to establish dock-lines within the limits of the navigable part of the river, if there is such navigable water, and to prevent any encroachments upon or obstructions within the water so outlined as navigable. It is not necessary to the determination of this case. But outside of the navigable water no dock-line can be drawn, and the property thereby taken for public use without compensation to or consent of the riparian owners. Nor do I decide that the city may not make and enforce all needful and reasonable rules and regulations as to the public and private use of this river necessary to the public health of said city, or to prohibit any encroachment upon the river-bed which will tend seriously to increase the danger of floods and the destruction of property thereby. The city saw fit in its proofs to rest upon the validity of the dock-lines. There is no showing that the building of this wall will be of the least detriment to the public health, or that it will have any tendency to increase the dangers arising from floods. The river is narrower below this wall, and made so by bridges of the city's own construction and maintenance, than it will be at any place where the wall will be situated after it has been constructed as proposed by the defendant. The city engineer can see no reason, in his testimony, why the building of this wall will tend either to the creation of overflows, or to increase the floods that sometimes have existed from various causes in high water. I have not space to discuss the testimony, but it is wholly barren of any showing that this wall, which the defendant is building, and proposes to build, upon his own land, will interfere in the least with the public use of the river, the rights of any other riparian owner in the stream, or damage any public or private interest to any perceptible extent. It may be that such a showing

can be made as would entitle the complainant to the relief asked, but it has not seriously been attempted by the proofs, presumably for the reason that the complainant supposed its case was completely made out by the law, by virtue of the legislative act and the municipal proceedings under it.

The decree of the court below must be reversed, the bill dismissed, with costs of both courts, but without prejudice to any further action or proceeding, if cause can be shown for it as heretofore pointed out.

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**CONSTITUTIONAL LAW—DUE PROCESS OF LAW.**—No person can be prejudiced or his rights of property affected without notice, actual or constructive: *Great West etc. Min. Co. v. Woodmas etc. Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204.

**WATERS—TITLE OF RIPARIAN PROPRIETOR:** See note to *Janesville v. Carpenter*, 20 Am. St. Rep. 136; *Fulmer v. Williams*, 122 Pa. St. 191; 9 Am. St. Rep. 88, and note; *Lake Superior L. Co. v. Emerson*, 33 Minn. 406; 8 Am. St. Rep. 679, and note. A grant of land bounded upon or along a river above tide-water, in New Jersey, carries the title to the grantee to the center of the stream: *Kanouse v. Stockbower*, 48 N. J. Eq. 42; see note to *Allen v. Weber*, 80 Wis. 531; 27 Am. St. Rep. 51.

**WATERS—RIPARIAN RIGHTS.**—For a discussion of the rights of land-owners on navigable waters fronting their lands, and in the lands under such waters, see extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226-235.

**WATERS—FLOATABLE STREAMS—RIPARIAN RIGHTS.**—As to the rights of riparian owners in the waters of floatable streams, see *Gaston v. Mace*, 33 W. Va. 14; 25 Am. St. Rep. 848, and note 862. The owner of the bed of a river navigable in fact, though not navigable under the common-law rule, may use the land and whatever is incident thereto, including the water over it, in any lawful way, but may not in so doing impede or materially interfere with navigation: *State v. Narrows I. Club*, 100 N. C. 477; 6 Am. St. Rep. 618.

**WATERS—RIPARIAN RIGHTS—CONSTRUCTION OF DOCKS, WHARVES, PIERS, ETC.**—As to the right of the riparian owner of lands adjacent to waters to construct docks, landings, piers, and wharves out in the waters, whether they are waters navigable in fact or not, see *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123, and note. Compare also note to *Miller v. Mendenhall*, 19 Am. St. Rep. 231-233. A riparian owner has no right as against the state or its grantees to extend wharves in front of his land below high-water mark on the shore of the sea: *Eisenbach v. Hatfield*, 2 Wash. 236.

**WATERS—DUE PROCESS OF LAW.**—A riparian owner's right to build in front of his lands out to navigable waters cannot be taken away, or its value impaired, even for public use, without compensation, under due process of law, and it cannot be taken at all for private use: *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123.

**NUISANCES—POWER TO DECLARE WHAT ARE.**—The legislature cannot make that a nuisance which is not such in fact: *First Nat. Bank v. Sardin*, 129 Ind. 201; ante, p. 187, and note.

## PEOPLE v. MURRAY.

[30 MICHIGAN, 276.]

**CRIMINAL LAW — PUBLIC TRIAL — RIGHT OF ACCUSED TO HAVE.** — A person accused of crime has, by the constitution and laws of Michigan, a right to a public trial, and an order made by the trial court in a criminal case directing an officer to stand at the door of the court-room, "and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in when they shall apply," violates the legal and constitutional right of the accused to a public trial, although there were private entrances to the court-room, through which persons who wished to do so might gain admission.

**WRIT OF CERTIORARI IS PROPER WAY TO BRING CASE BEFORE SUPREME COURT WHEN.** — Where a bill of exceptions would not show that the court-room was not crowded at the trial, that most of the seats provided for spectators were vacant, and that many different persons who showed themselves to be citizens of the state applied for admission and were refused, but these matters can all be properly raised and brought before the court by affidavit upon *certiorari*, the proper way in which to bring the case before the supreme court is by the writ of *certiorari*, and not by writ of error or bill of exceptions.

**FORMER JEOPARDY, PLEA OF, NOT AVAILABLE TO ACCUSED, WHEN.** — Where a conviction and judgment are set aside on proceedings instituted by a prisoner, on the ground that he has been deprived of a public trial, the plea of former jeopardy cannot avail to prevent a second trial.

**CERTIORARI.** The opinion states the case.

*Oscar M. Springer and W. Edgar Springer*, for the respondent.

*A. A. Ellis*, attorney-general, *James V. D. Willcox*, prosecuting attorney, and *Allan H. Fraser*, assistant prosecuting attorney, for the people.

**CHAMPLIN, C. J.** The respondent was convicted upon an information charging him with the murder of Edward Shoemaker, in the recorder's court for the city of Detroit, presided over by the Hon. F. H. Chambers, associate judge, and sentenced to be imprisoned in solitary confinement, at hard labor, for life, in the state prison at Jackson, and is now undergoing sentence. He sued out a writ of error, and also a writ of *certiorari*. No bill of exceptions was settled or signed, and the return thereto brings up merely the record of the case, to and including judgment, in which there appears to be no error. The writ of *certiorari* was based upon the petition of Oscar M. Springer, the attorney for respondent, made and sworn to in his behalf, and sets forth that the respondent was not accorded a public trial; that the public were excluded from day to day

from the court-room during the progress of defendant's trial, as appears by the affidavits of Charles Flowers, William May, John B. Stadler, Michael McKeogh, Henry S. Self, Joseph Boushey, William C. Nash, and Thomas M. Donnelly, filed with said petition and made a part thereof.

Thomas M. Donnelly's affidavit shows that he is an attorney at law; that during the progress of the trial of Thomas Murray, charged with the murder of Officer Shoemaker, he went to the recorder's court of the city of Detroit, where said case was on trial, and attempted to enter the court-room; that he was stopped in a peremptory manner by the officer at the door, who asked him this question, "Have you any business here?" to which deponent replied that he had no particular business, except that he wanted to hear what was going on at the trial; that thereupon the officer said to him, "The judge does n't want to see you"; and shoved him away from the door, and closed the door in his face; that he afterwards gained admission to the court-room through the clerk's office; that on entering the court-room he looked around, and saw how many persons were in the court-room, and according to his judgment there were not to exceed, outside of the officers of the court, the police commissioners, and policemen, a dozen persons in the court-room.

The affidavit of Charles Flowers shows that he is an attorney at law practicing in Detroit; that he was of counsel for David McCormick, who was charged, with Thomas Murray, with the killing of Officer Shoemaker, and was present at the greater part of the trial of said Murray, which continued about two weeks; that after the jury were sworn, and during the continuance of said trial, the public were excluded from the court-room, an officer being placed at the door of the court-room, who refused admission to the general public; that he on several occasions interceded with the said officer, and sought to gain admission for the friends of deponent and others, known by deponent to be reputable and orderly citizens, and such permission was invariably refused, the said officer informing Flowers that he had been instructed by the court to admit no one who had not business in the court; that on each of such occasions he noticed that the court-room was comparatively empty, the only persons present being about a dozen policemen, three or four detectives, several police commissioners, and others apparently interested in the conviction of defendant; that on one occasion he protested against the secret

trial which was going on, and asked the court to permit the public to enter; that the court replied that he did not propose to have the court-room crowded with people; that at the time this protest was made deponent counted the number of persons outside the bar of the court, and that there were five persons only present, and at the same time there were in the hall at least twenty persons, many of whom he knew to be reputable citizens, asking to be admitted; and he says that the seating capacity of the court-room is at least two hundred, and that at no time during the trial were there more than twenty persons in the court-room, outside of the officers and policemen before mentioned; that he can positively say that he saw at least fifty persons refused admission; that he was applied to by several citizens, and went with them to the officer at the door, and asked said officer to admit them; that they were friends of deponent, and had a right to witness the trial; and that on each occasion admission was peremptorily refused.

The affidavit of William May shows that he is a citizen of the United States, and a resident of the city of Detroit, county of Wayne, state of Michigan; that he is a deputy clerk in the office of the county clerk for the county of Wayne; that during the progress of the trial of Thomas Murray, charged with the murder of Officer Shoemaker, he endeavored to secure admittance to the recorder's court, where said Thomas Murray was on trial on the charge aforesaid, but was stopped at the door by a policeman; that he had considerable difficulty in gaining admission to said court; that he met in the corridor leading to the court-room two jurymen of the Wayne circuit court, who stated that they were desirous of attending said trial, and had been refused admission to said court-room; that before they could get into said court he had to obtain permission of the judge, although the benches in the court-room provided for the public were practically vacant; that the officer at the door of said court informed him that the general public were not allowed admission to the court; that he saw a number of persons standing around the corridor leading to the court, who had apparently been denied admission.

John B. Stadler in his affidavit says that he is a resident of the city of Detroit; that he attended the trial of Thomas Murray, charged with the killing of Officer Shoemaker; that he had difficulty in getting into the court-room, and would not have been admitted had it not been for the intervention of the prosecuting attorney; that during the trial, which lasted for nearly

two weeks, he knows that the public generally were excluded from the court-room; that he has seen a number of persons from day to day trying to gain admission to the court-room, and who were not admitted by the officer, although there was plenty of seating capacity in the court-room for spectators and the public; that on one occasion he remembers having seen persons trying to gain admission, and they were refused by the officer at the door, and he knows that there were not to exceed five or six persons sitting on the benches provided for the public; that he has seen the hall leading to the court full of people who were excluded from the court-room, although the benches provided for the public inside were practically vacant.

Michael McKeogh's affidavit shows that he is a citizen of the United States, and a resident of the city of Detroit; that he attempted to gain admission to the court-room for the purpose of witnessing and hearing the trial; that he was stopped in a peremptory manner by a police-officer stationed at the door, and informed that he could not go in; that he had an opportunity of seeing into the court-room, and can positively say that the benches provided for the public were practically vacant.

Henry S. Self says that during the progress of the trial he made application on two different occasions for admission to the court, on both of which there was an officer stationed at the door of the court-room where Murray was on trial, and he was refused admission by the officer at the door; that on both occasions he saw a number of persons trying to gain admission, who were refused in a peremptory manner by the officer at the door, notwithstanding the fact that the benches in the court-room provided for the public were practically vacant.

Joseph Boushey swears that he is a resident of the city of Detroit, and a citizen of the United States, and has lived in the city of Detroit for a number of years; that on the 22d and 23d of April, during the trial of Thomas Murray, he applied for admission to the court, and was peremptorily refused, although there were very few people in the court-room; that on the twenty-second day of April he stood around the corridor leading to the court-room from nine o'clock in the morning until twelve at noon, and that during that time he saw at least fifty persons try to gain admission, who were refused admission to said court-room; that he is able to say positively that there were not on that day to exceed a half-dozen persons sitting on the benches of said court-room on the north side



thereof; and again, on the 23d of April, he was in the corridor leading to said court-room, and saw at least fifty persons who were peremptorily refused admission by the police-officer stationed at the door, there being not to exceed a half-dozen persons sitting upon the benches in the court-room.

W. C. Nash swears that he is a resident of the city of Detroit, and that he made application for admission to the court-room during the progress of the trial of Thomas Murray, charged with the murder of Officer Shoemaker; that he was peremptorily refused admission by the police-officer stationed at the door of said court; that he had an opportunity to see into the court-room, and knows that the benches on the north side of said court-room provided for the public were practically vacant; and that at the time he made application for admission to said court he saw a number of persons in the corridor leading to said court who apparently desired to get in, but were not permitted to do so by the officer at the door.

To the writ of *certiorari* the presiding judge returns as follows: "I hereby certify and return that the following statement of what occurred is a true and correct statement of all that occurred, within my knowledge, during the said trial, while court was in regular session, in reference to the exclusion of the public from the court-room, as appears from the stenographic minutes:—

"*Mr. Springer:* My attention has been called to the fact that a large number of respectable citizens and tax-payers have been excluded from the court-room by the officer, who does not seem to be able to exercise any discretion whatever in that respect, and the talk around town is, that this trial is a sort of a star-chamber proceeding.

"*The Court:* You don't think so?

"*Mr. Springer:* I don't know, your honor. I don't know who has been excluded or who has not; but for the sake of saving the point, I desire an exception to be entered on the record.

"*The Court:* I cannot give you an exception to that. That is not in the order of trial. That is not the way to get it. There is nothing before the court on that subject. I want to say this: The orders to the officer were, that he should stand at the door, and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in when they shall apply.

"*Mr. Springer:* If your honor please, I understand—

" *The Court*: If you can make any capital out of that, you can make it.

" *Mr. Springer*: I am not trying to make any capital out of it.

" *The Court*: It looks like it.

" *Mr. Springer*: In order to determine whether or not these things have been done, I think it would be well to call the officer to the stand to testify to what he has done.

" *The Court*: You propose to stop the trial now, and introduce extraneous matter. I do not propose to.

" *Mr. Springer*: Your honor, then I will take an exception to that.

" *The Court*: The officer has got his orders, and they are in accordance with the law, as I take it, and if you have any objection you will have to take it in some other way than by exception. Proceed with the trial."

"And I hereby further certify and return that no order was ever made by me at or during the said trial excluding any person or persons from the court-room during the said trial; that the said trial was at all times during the same a public trial, within the meaning of the constitution; that the said court was every morning, while the same was had, regularly opened by an officer thereof, duly authorized, and declared open for the hearing and trial of causes, and there were several places of ingress and egress accessible to persons wishing to visit the said court at all times, and there were always present during said trial several persons, and at most times a very large assembly of persons, apparently listening to the trial."

We cannot accept the conclusion of the judge, "that the said trial was at all times during the same a public trial, within the meaning of the constitution." The first clause of section 28 of article 6 of the constitution reads as follows: "In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury."

The right to a public trial is one of the most important safeguards in the prosecution of persons accused of crime. In this case, when the accused is upon trial for a crime for which, if convicted, his punishment is that he must suffer a life imprisonment, — a civil death, — an order is made by the court which violates the constitutional right of the accused, and the statute enacted to protect the rights of parties in both civil and criminal cases. The right of the accused to a public trial is included in the same section of the constitution with the right

to a trial by an impartial jury of twelve men; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. It is not necessary to review the history of the administration of the criminal law in England, or to call attention to the abuses in its administration, to show the reason why these important provisions were inserted in our constitution, which, in this respect, is but a reflection of similar provisions contained in all of the constitutions of the American states and of the United States. They are each and all enacted for the protection of rights of persons accused of criminal offenses, and each is a constant memorial of the great abuses practiced in England at one time and another prior to the American revolution, in conducting criminal prosecutions. In *Hill v. People*, 16 Mich. 351, it was held that the accused person could not waive his constitutional right to a trial by a jury of twelve men, guaranteed to him under this section of the constitution, and it was said by the court that "it is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated."

In this case it is apparent that the constitutional rights of Murray were violated in the order of the court to the police-officer stationed at the door of the court-room, "that he should stand at the door, and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in when they shall apply."

It is shown beyond question that during the whole trial the court-room was not overcrowded, nor were the seats provided for spectators occupied to any great extent. This officer was under the control of the court, and when the court was informed that he was excluding citizens and tax-payers, he refused to take any notice of the complaint, and left the officer to exercise his discretion as to what respectable citizens he should admit. Is respectability of the citizen who desires to witness a trial to be made a test of the right of access to a public trial? and is that test to be left to the knowledge or discretion of a police-officer? Must a citizen who wishes to witness the trial of a person accused, whether he be a friend, an acquaintance, or a stranger to the accused, present to the police-officer stationed at the door of the temple of justice a certificate of his respectability? If so, by whom shall it be certified? By the mayor, the chief of police, or police com-

missioners, or by his pastor or clergyman? Neither the constitution nor the law requires any such preposterous condition to the admission of a citizen to attend and witness a trial, either civil or criminal.

The order of the court stationing the policeman at the door, with directions to admit none but respectable citizens, was not only a violation of the constitution, but it was a direct violation of the public statutes of this state. Section 7244 of Howell's Statutes enacts: "The sittings of every court within this state shall be public, and every citizen may freely attend the same."

This statute has been in force since 1846. It voices the sentiment of the people at the time the constitution of 1850 was adopted. It gives expression to what is there meant by a public trial. Courts have no dispensing power when the legislature has spoken. The judge who presided at the trial of this case was as much bound by this provision of law as the humblest citizen. The trial may have been an impartial one; the respondent may have been justly convicted; but it still remains that it was accomplished in violation of his constitutional and statutory right to a public trial. Edmund Burke never expressed a more important truth than when, speaking respecting the suspension of *habeas corpus* at the time of the American revolution, he said: "It is the obnoxious and suspected who want the protection of the law." Courts of final resort cannot consider the question whether the respondent was justly convicted or not in passing upon questions of law presented for their consideration. It is for the protection of all persons accused of crime — the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial — that one rule must be observed and applied to all.

Since the case was submitted, we have been furnished with a brief by Allan H. Frazer, in behalf of the people, who is the prosecuting attorney who secured the conviction of Murray. The position taken by the learned prosecutor in support of the conviction of Murray is: 1. That the fact that Murray was not awarded a public trial cannot be raised or adjudicated upon *certiorari*; 2. That he did have a public trial, within the meaning of section 28, article 6, of the constitution.

We do not think that the errors brought up by the writ of *certiorari* could have been reached by a writ of error. Many

facts which are shown in the affidavits and petition for the writ would not appear in the return to a writ of error or in a bill of exceptions. The bill of exceptions only brings up such facts as appear in the course of the trial in the presence of the court. And during the trial in this case the court plainly told the counsel for the accused that he could not raise the question in the way in which he was seeking to do it, and charged him with an effort to make capital out of his objections. The bill of exceptions would not have shown that the court-room was not crowded; that most of the seats provided for spectators were vacant; that many different persons, and the particular persons showing themselves to be citizens of the state, had applied for admission, and had been refused; none of these things could have appeared in the bill of exceptions. We think that they were properly raised and brought before the court by the writ of *certiorari*.

Three authorities are cited in support of the action of the judge. One is the case of *State v. Brooks*, 92 Mo. 573. In that case, in the opinion handed down by the supreme court, it was said that an objection was taken that the defendant did not have a public trial, and the court said: "This claim is based upon the fact that during the early stages of impaneling the jury two men were stationed, on the afternoon of one day and the forenoon of the next day, at the door of the court-room, who refused to admit any one into the court-room except jurors, witnesses, or officers of the court, or those having business in court. It appears that when this matter was brought to the attention of the court, the court stated that no order had been made stationing men at said door, and announced that any one who wished to come into the court-room could do so, and made an order that all persons be admitted until all the seats were filled. Had the court either refused to make such an order, or if, after making it, had refused a request on the part of the defendant that the jurors who had been examined touching their qualifications while the men were stationed at the door should be re-examined, this might have afforded some ground for the complaint made; but no such a request was made."

This is not in any respect a parallel case to the one under consideration. In the *Brooks* case the exclusion of the public only continued through the afternoon of one day and the forenoon of the next. In *Murray's* case it lasted during the entire trial of two weeks. In the *Brooks* case, when the matter was

called to the attention of the court, the court stated that no order had been made stationing men at the door, and announced that any one who wished to come into the court-room could do so, and made an order that all persons be admitted until the seats were filled. In Murray's case the court made the order stationing the policeman at the door to see that all respectable citizens be admitted. His attention was called to the fact that respectable citizens and tax-payers were refused admission, and instead of making an order that all citizens be admitted until the room was filled, he said that "the officer has got his orders, and they are in accordance with the law, as I take it, and if you have any objection, you will have to take it in some other way than by exception. Proceed with the trial."

The judge's position in Murray's case finds no support whatever in the Brooks case.

We are also cited to the case of *People v. Kerrigan*, 73 Cal. 223. In that case the defendant was convicted of an assault with intent to commit murder. The defenses interposed at the trial were "not guilty and insanity." During the progress of the trial in the court below, the defendant became greatly excited, and indulged in profane and abusive language, addressed to the judge and other officers of the court. Her conduct created so much commotion among the spectators that the trial was seriously interrupted, and the court found it necessary to make an order excluding spectators from the court-room. In deciding the case, the court said: "Appellant claims that she was deprived of the constitutional right of a public trial by the making and enforcement of this order. There is some controversy as to the scope of the order, — which was not entered in the minutes at the time, — but the judge certifies that the order was, 'that the lobby outside of the court-room should be cleared of spectators, as their presence tended to irritate and excite the defendant, and that no persons except officers of the court, reporters of the public press, friends of the defendant, and persons necessary for her to have on said trial should be allowed to remain.' It appears, further, from the statement of the judge, that no order was made requiring the doors to be closed, and that in fact the friends of defendant and reporters were permitted to come and go at will; that the order was made by the court on behalf of the defendant, as well as to preserve order, because the attendance and conduct of a large crowd of spectators in the court-room evidently

tended to excite the defendant; and it is apparent from the affidavits, showing the conduct of the defendant and many of the spectators, that such was the fact. In our opinion, the order and action of the court, as shown by the bill of exceptions, were not in violation of the defendant's right to a public trial. It was proper, we think, under the circumstances, to exclude from the court-room those who were excluded, not only because of the vulgar and profane language of the defendant herself, but because such action was evidently necessary to protect the court from indignity and indecorum. No actual injury to the defendant is shown. It is not shown that any person who could have been of any service to the defendant on her trial was excluded. While it is very important that all the rights guaranteed by the constitution to a person charged with crime should be fully and fairly awarded to him, it is also important that courts of justice should be upheld in the enforcement of all necessary and reasonable rules for the orderly, speedy, and effective conduct of their duties."

Neither is this case an authority for what was done in Murray's case. The court did not order the court-room to be cleared of spectators, but the lobby outside. There is nothing in the facts of that case which assimilate in any degree to the trial of Murray. Here no violence is shown, no disorderly conduct, no violent or disgraceful action on the part of Murray, which tended to lessen the dignity of the court, or bring the administration of justice into disrepute.

I cannot accede to the correctness of the proposition intimated in that case, that if a public trial has not been accorded to the accused, the burden is upon him to show that actual injury has been suffered by a deprivation of his constitutional right. On the contrary, when he shows that his constitutional right has been violated, the law conclusively presumes that he has suffered an actual injury. I go further, and say that the whole body politic suffers an actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated in the person of the humblest or meanest citizen of the state. The constitution does not stop to inquire of what the person has been accused or what crime he has perpetrated; but it accords to all, without question, a fair, impartial, and public trial. There is no such limitation in the constitution, nor in our statute above quoted, from which it can be inferred that "the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suf-

ferred to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

Who is to decide who are the friends of the accused? The law makes no such test, but allows all citizens freely to attend upon any trial, whether civil or criminal. Instances have been referred to by Judge Cooley in his work upon constitutional limitations, 5th ed., at page 380 (\*312), where, under certain circumstances, it might be proper to exclude a certain portion of the community from attending trials which would tend to degrade public morals, or would shock public decency, in which he says that at least the young should be excluded. There can be no objection to this, so long as citizens of the state who have arrived at the years of discretion and manhood are permitted to enter freely. The learned commentator lays it down that "the requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."

It is also urged that in this case the prisoner was accorded a public trial, for the reason that there were several other ways of obtaining ingress to the court-room than that in which the public generally entered. The learned judge returns to the writ of *certiorari* that "there were several places of ingress and egress accessible to persons wishing to visit the said court at all times." But this is a mere subterfuge. There was a public entrance, at which the public applied for admission and were refused. As is shown by the affidavits, or one of them, one of the persons, knowing of the private entrance through the clerk's office, entered in that manner, after being refused admission at the public entrance. It is not usual for the public to pass through these private entrances into the court-room, and it is no answer for the court to say, that although he stationed a policeman at the door of the public entrance, there were other ways of ingress to persons who wished to gain admission. We have no hesitation in saying that the prisoner was denied the right of a public trial, and the proceedings in consequence must be declared a mistrial, and his conviction must be set aside, and a new trial must be had.



We are asked to discharge the prisoner, on the ground that he has been once in jeopardy, and cannot, therefore, be tried again. The question is a serious one, and we have considered it with care. The judgment and conviction are set aside in this case on a proceeding instituted by the prisoner, and is to be treated as if the judgment had been arrested on his own motion, and the judgment and verdict set aside. In such cases the plea of former jeopardy cannot avail: *State v. Hays*, 2 Lea, 156; *State v. Walters*, 16 La. Ann. 400; *State v. Redman*, 17 Iowa, 329; *People v. Casborus*, 13 Johns. 351; *State v. Norvell*, 2 Yerg. 24; 24 Am. Dec. 458; *Commonwealth v. Hutton*, 3 Gratt. 623; *State v. Clark*, 69 Iowa, 196; *Gerard v. People*, 3 Scam. 362; *People v. Barric*, 49 Cal. 342; *People v. Howell*, 28 Cal. 456; *Morrisette v. State*, 77 Ala. 71; *People v. Helbing*, 61 Cal. 620; *Johnson v. State*, 29 Ark. 31; 21 Am. Rep. 154; *People v. White*, 68 Mich. 648; *People v. Price*, 74 Mich. 37, 44; 1 Bishop's Criminal Law, secs. 1004, 1016.

In *Hill v. People*, 16 Mich. 351, one of the jury who convicted the prisoner was an alien, and therefore disqualified, and it was held that his conviction was a violation of section 28, article 6, of the constitution. The respondent in that case moved for a new trial upon that ground. This court, in reversing the judgment, ordered a new trial.

The judgment must be reversed, the prisoner must be remanded to the custody of the sheriff for the county of Wayne, and a new trial is ordered.

GRANT, J. I concur with my brother Champlin in his opinion that the respondent was not accorded a public trial, within the meaning of the constitution and the laws of this state, but I cannot concur with him in holding that the writ of *certiorari* was the proper way to bring the case to this court. I think the writ was improvidently issued.

The respondent offered testimony tending to show that persons had been excluded from the court-room during the trial, by an officer in charge of the principal entrance to the court-room. The court refused to admit it. Respondent's counsel excepted. He should have settled a bill of exceptions, and brought the case to this court by a writ of error. It is no answer to this to say that the trial court refused an exception. This no court could prevent. Counsel announced his exception, which was minuted by the stenographer, as shown by the return. No order was made by the court and entered upon

the minutes. The judge had given instructions to the officer not to permit the court-room to be overcrowded. This instruction was proper, but he had no right to commit to the officer the determination as to who were respectable citizens to be admitted. It is apparent that the court could make no return to many of the statements made in the affidavits, for the facts they stated did not occur in his presence. The exclusion of citizens was a fact to be proven like any other fact, and the truth should be elicited by examination and cross-examination. It does not seem to me to be the proper practice that so important a question should be determined in the court of last resort upon *ex parte* affidavits which contain many hearsay statements. To illustrate: several of the affiants say that the benches were practically vacant, without giving any statement or opinion as to how many were there. What is meant by "practically vacant"? How many, in the opinion of this witness, or how few, should be present in order to constitute such practical vacancy? Counsel for respondent recognized this as the proper practice, in raising the point upon the trial, for in a reply to a question by the court, he said: "I don't know who has been excluded or who has not, but for the sake of saving the point, I desire an exception to be entered on the record."

Respondent was convicted May 3, 1890. August 28, 1890, he presented to one of the justices of this court a petition for a writ of *certiorari*, which was allowed, and no steps appear to have been taken to bring the case to a hearing in this court until the October term, 1891. The record contains less than ten pages. All the facts were known to the respondent and his counsel at the trial. All the papers could have been prepared in a few hours. The case could, and should if presented at all, have been presented to this court at the June term, 1890. Instead, however, the case rests for three and one half months, until the time to settle a bill of exceptions has expired, and then, after obtaining an allowance of the writ, rests for thirteen months longer. Meanwhile, it is probable that the people's testimony is scattered and lost. Such delays, if attributable to the respondent, do not comport with innocence, especially when he is in prison serving out his sentence. These delays cannot be too severely condemned. They are, in my judgment, a disgrace to the administration of the criminal law. For these reasons, I think the writ should be dismissed.

**PUBLIC TRIAL, RIGHT TO, AND WHAT ARE INFRINGEMENTS UPON IT.** — Article 6 of the amendments to the constitution of the United States provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." The constitutions of most, if not all, of the states of the Union contain the same or similar provisions. The right to a public trial is, therefore, one that cannot be questioned. Bishop says: "It is the immemorial usage of the common law, not only in England, but in every part of this country, since its earliest settlement, to try all prisoners in open court, to which spectators are admitted"; 1 Bishop's Crim. Proc., sec. 957. And it is no doubt owing to the prevalence of this usage, and to the habits of thought resulting therefrom, that there is such a dearth of judicial decision upon the question under discussion. The principal case is the only one we can find, after a diligent search, in which a conviction has been set aside on the ground that the accused was denied the right to a public trial. But while the accused has the right to a public trial, the court has the power, in proper cases, to put a reasonable limit to the number of persons that may be admitted to the court-room during the trial, and may, at least temporarily, exclude from the court-room noisy and boisterous persons, whose presence and conduct tend to embarrass witnesses, or to interfere with the due and orderly progress of the trial. It may also regulate the indiscriminate admission of persons of a known class, who might endanger by their conduct the security of the administration of justice. And it may exclude from the court-room a portion of the community, particularly the young, during trials that tend to shock the sense of decency or degrade the public morals. Such precautionary regulations and limitations are not regarded as infringements upon the right of the accused to a public trial: Cooley on Constitutional Limitations, 6th ed., sec. 379; 1 Bishop's Crim. Proc., 2d ed., sec. 959; Rapalje's Crim. Proc., sec. 213; *People v. Swafford*, 65 Cal. 223; *People v. Kerrigan*, 73 Cal. 222; *State v. Brooke*, 92 Mo. 542; *United States v. Buck*, 4 Phila. 161; *Grimmett v. State*, 22 Tex. App. 36; 58 Am. Rep. 630. Judge Cooley, in discussing this subject, says: "It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether"; Cooley on Constitutional Limitations, 6th ed., sec. 379. Cadwalader, J., in charging the jury in the case of *United States v. Buck*, 4 Phila. 169, said: "If a class of persons are for any reason dangerous attendants upon a court, so dangerous as to interfere with its police and security, some discrimination as to their unlimited admission may from necessity be exerceisable while the danger continues. Courts of justice must be

open; but their police must also be maintained. If a subject of judicial investigation is one as to which any known class of persons are too much excited in feeling to be able patiently to attend upon its discussion, an indiscriminate admission of all persons of the class would sometimes be very dangerous." And Willson, J., in delivering the opinion of the court in *Grimmett v. State*, 22 Tex. App. 36, 58 Am. Rep. 630, said: "In our opinion, the order and action of the court, as shown by the bill of exception, were not in violation of defendant's right to a public trial. It was very proper, we think, under the circumstances, to exclude from the court-room the principal portion of the audience, not only because of the vulgar and indecent nature of the evidence being developed, but because the audience was disorderly, and it was impossible to discover the particular individuals creating the disturbance, and therefore impossible to conduct the trial in an orderly manner without excluding from the court that portion of the audience in which disorderly conduct was occurring. It was also proper to pursue this course in order to relieve the witness of the embarrassment which the crowd of persons and the disorderly conduct of such crowd occasioned. A reasonable portion of the audience, consisting of attorneys and officers of the court, was permitted to remain in the court-room, and the doors of the court-room were kept closed temporarily only, during the cross-examination of one witness. It is not shown that any person who could have been of any service to the defendant in his trial was excluded, or that any injury whatever was done him by the order and acts complained of by defendant. While it is of the highest importance that every right guaranteed an accused person by the constitution or the law should be carefully and liberally accorded him, we must not do violence to reason and justice in construing such rights." That was a trial for rape, the witness under examination was a girl only fourteen years old, and the persons in the audience persisted in laughing aloud.

In the case of *Stone v. People*, 2 Scam. 326, it was held that the closing of the doors of a court-room to prevent confusion arising from noise and disturbance when ingress and egress are not prevented, or for a temporary purpose, where existing circumstances require it to be done, but not for the purpose of excluding any one connected with the trial, does not render the trial private, and ought not to be objected to. In delivering the opinion of the court in that case, Smith, J., said: "There is no question that the constitution of the state has guaranteed a public as well as an impartial trial; but the causes stated in the deposition do not show that the trial was not public. We should infer from the facts stated in the depositions that some noise and disturbance prevailed in the court-room, and that in order to avoid the confusion which might have arisen therefrom, the officer caused the doors to be locked. No inconvenience appears to have arisen from the course pursued, and we cannot well see how any could have occurred. We have no doubt, however, that the doors may be closed for a temporary purpose, where existing circumstances eminently require it to be done, but not for the purpose of excluding any one connected with the trial. The record shows the fact that it occurred while the motion for arresting the judgment was pending, under consideration and discussion, and it was consequently after the verdict had been rendered, and trial by jury terminated. We see no cause of error here."

In *People v. Sprague*, 53 Cal. 491, it was decided that an order excluding from the court-room such of the jurors summoned for the term as are not impaneled to try the case is not a deprivation of the right of public trial.

## L'ETOURNEAU v. HENQUENET.

[89 MICHIGAN, 42.]

**WILL, CONSTRUCTION OF.** — THE INTENTION OF A TESTATOR MUST BE GATHERED FROM a consideration of the whole will together, giving to each part or clause due weight, as expressing some idea of the testator in the disposition of his property.

**WILLS. — FUTURE CONTINGENT ESTATES, AND THE VESTING AND DIVESTING THEREOF.** — If by a will property is devised to the testator's wife for life, and after her life has terminated then to certain of his children, and in case any of them shall not survive him and her, then the share of the deceased child or children shall be divided amongst the remaining children, "and to their heirs share and share alike," such will creates a vested future estate in the children named therein, subject to be defeated as to any of them by his or her death in the lifetime of the testator or of his wife. As to the shares of any child or children dying after the husband and before the wife, they become contingent remainders to the surviving children and the heirs of any deceased child at the termination of the estate to the wife. Such contingent remainder could not vest until the death of the wife, because until then it could not be known who would be entitled to it as heirs or survivors.

**REMAINDERS ARE CONTINGENT** under the statute of Michigan if either the person to whom the estate is given or the event upon which it is to take effect remains uncertain.

**A VESTED ESTATE**, whether present or future, may be absolutely or defeasibly vested. In the latter case, it is said to be vested subject to being divested on the happening of a contingency subsequent.

**WILLS — CONTINGENT ESTATES. — WHERE THERE IS A SUBSTITUTED DEVISE** to take effect in case any of a class die during a precedent estate, the remainder is then vested in the existing members, subject to open and let in new members, and to be wholly divested in favor of a substituted devisee as to the share of a member dying.

**MORTGAGE UPON A CONTINGENT ESTATE.** — A mortgage executed by one who has an estate in land which is subject to be defeated by his death before that of another person becomes invalid and unenforceable upon the happening of the contingency upon which the estate was to terminate.

PROCEEDING in which it was necessary to construe a will, the several clauses of which are sufficiently stated in the synopsis of the dissenting opinion of Judge Morse, *post*, p. 317.

*Eldredge and Spier*, for the complainants.

*Edgar Weeks and T. M. Crocker*, for the defendant Henquenet.

*Edward E. Kane*, for the defendants Duchaineau and the Congregation des Freres de la Charite.

*James J. Atkinson and William F. Atkinson*, for the defendant De Broux.

CHAMPLIN, C. J. The bill is filed to remove a cloud upon title, and to obtain a construction of a will, which is quite fully set out in the opinion of my brother Morse.

But two questions are involved, and they relate to the construction to be given to the third and eighth clauses of the will: 1. Does the fee of the real estate devised by the third clause vest in the devisees therein named, upon the death of the testator? 2. If it did vest under the third clause, was it subject to be divested under the eighth clause, in case of the death of either of the devisees before the termination of the precedent estate devised to the widow?

The answer to these questions must depend upon the intention of the testator, either as expressed or inferred or assumed, in accordance with the well-established canons of construction. The fundamental rule of construction is, that the intention of the testator must be gathered from a consideration of the whole instrument together, giving to each part or clause due weight, as expressing some idea of the testator in the disposition of his property. The first and dominant idea of the testator, as manifested in this will, is, that his wife, Clotilde, shall have a life estate in possession of all of his property, real and personal, with remainder over to his children, as therein set forth. The time of enjoyment of the remainder was postponed until the death of his wife. Section 5523 of Howell's Statutes enacts that "estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy."

Section 5525 enacts that "estates in expectancy are divided into,—1. Estates commencing at a future day, denominated 'future estates'; and 2. Reversions."

Section 5526 defines a "future estate" as "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time."

Section 5527 provides that "when a future estate is dependent upon a precedent estate, it may be termed a 'remainder,' and may be created and transferred by that name."

We have here, then, under the third clause of this will, a vested future estate, within the very terms of the statute, devised to Sarah, Emily, and Eleanor.

The question now arises, Was it the intention of the testator to make this vested future estate subject to be defeated by the

contingency mentioned in the eighth clause? In the first place, it will be noticed that the *habendum* clause does not devise the estate absolutely to Sarah, Emily, and Eleanor, and their heirs and assigns forever, unqualifiedly, but adds this significant qualification: "After the determination of the life estate aforesaid." He made no such qualification in the *habendum* to his devise to Josephine, nor in the *habendum* to his two sons, in the fifth clause. After disposing of the remainder to certain of his children named, excluding Margaret, the daughter of his deceased son Charles, he then makes such remainder subject to the following contingency: "And whereas, one or more of my said children may not survive me or my said wife, I hereby order, direct, and devise the share of such devisee or devisees in such case to be equally divided amongst the remaining children herein named, and to their heirs, share and share alike."

It is claimed that this clause is obscure, and open to two constructions. I do not so regard it. The testator was looking to the future. The question with him was, What provisions should be made with reference to these remainders in case either of his children named to whom he had devised the lands in remainder should die before he did, or before his wife, to whom he had granted the life estate in possession? If such contingency should happen, he devises the share of such devisee or devisees to the surviving children named, to whom the share or shares had been given, and to their heirs, share and share alike. The obvious sense and meaning is, that "one or more of my children may die before my will can take effect by my death," and he provided for that contingency should it happen; and it also occurred to him that one or more might die before they could come into possession by the death of his wife; and in either case he provided what should be done with the share of such children named,—it should go to the heirs of any such deceased child, share and share alike. He disinherited no child of his children named as devisees. He did not intend that Margaret should, in any event, share in the "worldly effects" left by him. He gave explicit reasons for that, and provided that if she should survive him, she should be paid ten dollars by his executors out of his personal estate. Can it be supposed that, after making this declaration of his intent not to have Margaret share in his estate, he, by the next clause, admitted her to a share in the devises he had given to his children in case one or more died before

he or his wife died? It seems to me that such a construction would be a forced one, and quite contrary to the intention expressed.

Neither can I construe the language to mean that "my said wife may not survive me." This construction destroys the whole scheme of the will. The will can have no force unless there be an intermediate estate in his widow, and the legacies would all lapse. He did not intend that any of his property should be administered as intestate property. He disposed of the whole, and yet, to give this clause the construction contended for by the counsel for defendants, causes these shares to be administered the same as intestate estates, and admits Margaret to share in the real estate, contrary to the will of the testator.

The remainder to his children was subject to the limitation of the eighth clause. The devise to his children created a vested estate, subject to be defeated by the subsequent contingency stated in the eighth clause. As to the shares of any child or children dying before the death of Clotilde, they became a contingent remainder to the surviving children, and the heirs of any deceased child, at the termination of the precedent estate of Clotilde. As to such the precedent estates in remainder terminated on the death of such child, and a contingent remainder was created in the surviving children and the heirs of any deceased child. Such contingent remainder could not vest until the death of Clotilde, for until then it could not be known who would be entitled to it as heirs or survivors. In the language of the statute, it was contingent while the person to whom it was limited to take effect remained uncertain.

By the statute, contingent estates are made to depend upon two conditions,—one is, while the person to whom the estate is given remains uncertain, and the other when the event upon which such estates are limited to take effect remains uncertain. In this case the event upon which they are limited to take effect must be uncertain, for the reason that one or more of the children, if the contingency happened, must die before his wife, Clotilde,—events which must happen, if at all, within a certain time; and it is the event, and not the time, that controls in determining the question as to whether the remainder is contingent or vested. But they are contingent also while the person to whom they are limited to take effect remains uncertain, and that is the contingency in this case; for it was



not known, at the time the testator made his will, or at the time when he died, that Timothy and Eleanor and Emily would each die before his wife, Clotilde, should die. And by the eighth clause he made the contingency to happen, not upon the time of distribution, but the contingency was annexed to the gift itself, and in such cases they have been regarded as contingent, and not vested, remainders.

A vested estate, whether present or future, may be absolutely or defeasibly vested. In the latter case, it is said to be vested, subject to being divested on the happening of a contingency subsequent: Chaplin on Suspension, sec. 57; *Manice v. Manice*, 43 N. Y. 303; *Howell v. Mills*, 7 Lans. 193; *Kelso v. Lorillard*, 85 N. Y. 177; *Baker v. McLeod's Estate*, 79 Wis. 534; *Burnham v. Burnham*, 79 Wis. 557. And where there is a substituted devise, to take effect in case any of the class die during the precedent estate, the remainder is then vested in the existing members, subject to open to let in new members, and to be wholly divested in favor of the substituted devisee as to the share of the member dying: Chaplin on Suspension, sec. 59; *Smith v. Scholtz*, 68 N. Y. 41; *Baker v. Lorillard*, 4 N. Y. 257; *Du Bois v. Ray*, 35 N. Y. 162. In *Carmichael v. Carmichael*, 1 Abb. App. 309, there was a devise to the testator's wife for life, and from and after her decease to the testator's children who might then be living. The court held that "the estate does not vest in remainder until her [the widow's] death, and then it vests only in those children who shall be living at the time of her death." See also *Hennessy v. Patterson*, 85 N. Y. 91.

It remains to be considered what effect shall be given to the mortgages executed by Emily upon the property described in the third clause of the will. These were executed after Eleanor's death, and purported to be upon the undivided five twelfths of the real estate described in the third clause of the will. Emily was at that time vested with the undivided third interest in remainder in the land. Timothy had died in 1861, leaving four of the six children at the time the mortgages were executed. Both Eleanor and Timothy died childless, without heirs. Emily evidently supposed that the one-third interest in the remainder of Eleanor was to be divided among the four surviving children, and she would on that basis be entitled to the undivided one third of one fourth, as she considered, equal to one twelfth, which, together with her four twelfths, would equal five twelfths; and upon this share she executed the two

mortgages set out in the bill. The property is said to be worth twenty-five thousand dollars.

Section 5551, Howell's Statutes, provides that "expectant estates are descendible, devisable, and alienable in the same manner as estates in possession." Contingent estates, although not vested, are within the provisions of the section; but when alienated, if they are defeasible, they are subject to the contingency by which they may be defeated. Emily's estate was subject to be defeated by her death before that of her mother, by which the estate then vested in her was cast upon her surviving brother and sisters, share and share alike; and of this the purchaser or mortgagee must take notice. She could not defeat the remainder from vesting in her brother and sisters upon the contingency of her death before she was entitled to come into the possession, for the statute (How. Stat., sec. 5543) declares that "no expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger, or otherwise."

Neither can these expectant estates of her brother and sisters be defeated by the manner of dealing with the estate by the devisees of the testator. I find no evidence in the record that the devisees ever dealt upon the basis now contended for by defendants, who divide the estate into fifty-four shares, giving Emily twenty-one and Margaret three fifty-fourths; nor, in my opinion, does the will executed by Timothy lend any aid to defendant's counsel. That will was dated the fourth day of February, 1861. He died on the next day. His father was already dead. The will shows that he did not at that time suppose that he had any vested estate in the remainder left to him and his brother, Louis. This is the language he makes use of in disposing of his estate: "*Second.* I give, grant, and devise all and every my interest, right, and estate, after the payment of said debts and expenses aforesaid, whether real or personal, and whether present or in remainder (being chiefly my interest and estate in the personal property and real estate left by my deceased father, Francis l'Etourneau, by his last will), to my sisters Emily, Sarah, and Eleanor l'Etourneau, and to my sister, Josephine Paquette, and my brother, the Rev. Louis J. l'Etourneau, equally, to be divided between them, share and share alike; subject, nevertheless, to and under the limitation hereinafter mentioned: 1. In case of the

death of my said sister, Mrs. Josephine Paquette, and of the heirs of her body, before said estate so left by my father in remainder shall become vested, I direct that her share shall descend, and hereby devise her share of said estate, to my surviving brother and sisters equally, to be divided amongst such survivors, share and share alike; 2. In case of the death of either of my said sisters or brother before said estate so as aforesaid devised by me shall become vested in them, I direct and devise that the share of said deceased sister or brother go to the survivor or survivors equally, to be divided share and share alike."

It is apparent that he did not regard the remainder left by his father as yet having vested in him, and it will be further noted that he gives the property in the same manner and to the same persons mentioned in the eighth clause of his father's will. He provides for the contingency of either of his sisters or brother dying before the estate given by himself becomes vested in them, and directs that such share shall be equally divided between the survivors, share and share alike; thus treating his estate as a contingent remainder, and not to vest in his devisees until the death of his mother. Emily made her will May 2, 1868, she only assuming to devise "such property, either real or personal, as I have or may hereafter during my life inherit at any time." This will throws no light upon the construction to be placed upon that executed by her father. Moreover, I consider it would be an unsafe doctrine to hold that the intention of a testator should be ascertained from the claims made by devisees who are anxious to obtain the property which they think they are entitled to under their construction of the will.

In my opinion, the mortgagees have no claim upon Emily's share, which by the eighth clause passed to the surviving brother and sisters. Whether the eighth clause constituted a contingent remainder or not in such as should take under it, it can make no difference in the result in this case, because Emily having died without heirs before the death of her mother, her interests and estate, whether vested or contingent, were defeated, and passed to the surviving children, and the heirs of any deceased children, who, upon Clotilde's death, became seised in fee of the remainder, and entitled to the immediate possession of the lands devised.

It is my opinion that the decree of the circuit court is erro-

neous, and should be reversed, and a decree entered herein in accordance with these views.

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MORSE, J., delivered a dissenting opinion, of which the following is a synopsis: Francis l'Etourneau died August 26, 1860, leaving a last will and testament. In the second clause he gave, devised, and bequeathed to his wife, Clotilde l'Etourneau, for and during her natural life, all his real and personal estate, to have and to hold said real estate and its appurtenances to her for and during the full term of her natural life, with remainder over as therein-after set forth. In the third clause, after the determination of the life estate to his wife, he gave, granted, and devised to his daughters, Emily, Sarah, and Eleanor l'Etourneau, a certain tract of land in the city of Detroit, known as the Western Hotel property, and described as lots 21 and 22, in block 5, together with the hereditaments and appurtenances, rents issues, and profits thereof, to have and to hold the same to the said Sarah, Emily, and Eleanor, their heirs and assigns forever, after the determination of the life estate aforesaid. In the fourth clause, after the determination of the life estate of his wife, he gave, granted, and devised to his married daughter, Josephine Paquette, a certain parcel of land in Macomb County, state of Michigan, particularly described, together with the hereditaments and appurtenances thereunto belonging, to have and to hold the same to her and to the heirs of her body begotten, with remainder over to her or their heirs. In the fifth clause, after the determination of the life estate to his wife, he gave, granted, and devised to his sons, Rev. Louis Job l'Etourneau and Timothy E. l'Etourneau, certain lots of land in the village of Mt. Clemens, in said Macomb County, and also certain lots in the city of Detroit, particularly described, together with all the hereditaments and appurtenances thereunto belonging, to have and to hold the same unto the said Rev. Louis J. l'Etourneau and the said Timothy E. l'Etourneau, their heirs and assigns forever. In the sixth clause, after the death of his wife, he gave, granted, and bequeathed to each and every of his children above mentioned, and to their heirs and assigns, all his personal property, if there should be any remaining, equally to be divided among them, share and share alike. In the seventh clause he remembered his granddaughter Margaret, the child of his late son Charles R. l'Etourneau, and believing that in his lifetime he had given to her father, of whom she was sole heir, his full share of his worldly effects, he bequeathed to the said Margaret, if she survived him, the sum of ten dollars, to be paid to her by his executors out of his personal estate. The eighth clause was in these words: "And whereas, one or more of my said children may not survive me or my said wife, I hereby order, direct, and devise the share of such devisee or devisees in such case to be equally divided amongst the remaining children herein named, and to their heirs, share and share alike."

His wife and his son Louis were made executors, with full power to the survivor of them. All the persons named in the will survived the testator. On the 5th of February, 1861, Timothy E. died testate. On the 13th of May, 1862, Eleanor died intestate, unmarried, and without issue. Emily married the defendant, August Henquenet, and died testate on the 15th of October, 1867. John Otto was appointed administrator of her estate with the will annexed. At the death of Mrs. Clotilde l'Etourneau, on the 29th of August, 1868, there survived of the children and devisees of Francis l'Etourneau the following: Louis J. l'Etourneau, Sarah l'Etourneau, and Mrs. Josephine Pa-

quette. On the 16th of October, 1888, Sarah l'Etourneau was adjudged incompetent, and Louis J. l'Etourneau was appointed her guardian, and qualified as such. Louis J. l'Etourneau and Sarah l'Etourneau, by her guardian, filed this bill in the circuit court of Wayne County, in chancery, on the 6th of December, 1888, praying the court to determine their interests in the property mentioned in the third clause of the will, known as the Western Hotel property. August Henquenet was made a defendant because he claimed a life estate in five twelfths of the premises, under the will of his wife, Emily. Francois J. De Broux is the holder of a mortgage upon five twelfths of the property, executed February 3, 1872, by Emily Hauquenet and her husband to William C. Groesbeck for two thousand dollars, and assigned by him to Charles Ryckaert January 4, 1881, and by Ryckaert to De Broux, July 16, 1888. On January 15, 1885, Emily Henquenet executed another mortgage on five twelfths of the same premises for five thousand dollars to De Broux. This was assigned July 8, 1883, to Joseph F. de Poorter, who subsequently died testate. Defendant Duchaineau is executor of his will, and the Congregation des Freres de la Charite, a foreign corporation, claims under the will of De Poorter an interest in this mortgage. At the date of the filing of this bill, the mortgage had been foreclosed by advertisement, and bid in by De Broux. Josephine Paquette, after the death of Eleanor, claimed a one-twelfth interest in the property, and on September 2, 1884, before the death of her mother, conveyed the same to one Morton. By meane conveyances it passed from Morton to one Horace Brewer, and upon his death it passed to Charles J. Brewer, who died leaving two minor children, Florence and Horace R. Brewer, who, with their father's administrator, are made defendants. The complainants claim that under the eighth clause of the will Eleanor and Emily, who died before their mother, never had any vested interest in this property, and that one third of it at the mother's death became vested in Sarah, and the other two thirds in equal shares in Louis, Sarah, and Josephine, dividing the title as follows: five ninths in Sarah, and two ninths each in Louis and Josephine. Josephine now seems to favor this construction of the will, although, in the disposition of the property willed to her, she has heretofore, as have all the family, acted upon the supposition that the defendant's construction was the correct one in the interpretation of her father's will. The defendants contend that upon the death of the testator, Emily, Sarah, and Eleanor, who were all then living, were vested each with an equal undivided share, subject only to the life estate of their mother. Eleanor dying without issue and intestate, her three ninths of the premises descended in equal shares to her mother, Louis, Sarah, Emily, and Josephine, and the granddaughter, Margaret, leaving the title distributed as follows: Emily and Sarah each twenty-one fifty-fourths, and Josephine, Louis, and Margaret each three fifty-fourths, subject to the life estate of the mother, and the mother three fifty-fourths and her life estate in the whole. It was under this idea of the condition of the title that Emily executed the two mortgages, and Josephine deeded to Morton.

Timothy made a will the day before he died, by which he divided all his property, "whether present or in remainder (being chiefly my interest and estate in the personal property and real estate left by my deceased father, Francois l'Etourneau, by his will)," to his sisters and brother, share and share alike; providing that in case of the death of his sister Josephine and of the heirs of her body "before said estate so left by my father in remainder shall become vested," her share shall descend in equal parts to the surviving sisters and brother, and that "in case of the death of either of my said sisters or

brother before said estate so as aforesaid devised by me shall become vested in them," the share of said deceased sister or brother shall descend equally to the survivor or survivors. The will of Timothy was admitted to probate. It does not appear that he had any other property than that willed to him by his father. If the complainants' contention is correct, he had nothing to will away. There is evidence tending to show that Louis recognised the fact that Emily had an interest in the Mt. Clemens property, as devisee of Timothy, and that he offered to trade other property of his for that interest. Louis testified that after Timothy's death, a portion of the Detroit property, known as the Hamtramck property, was treated as the property of the family.

August 10, 1886, Josephine sold the farm which her father willed to her, no one joining in the deed with her, except her mother, and received the whole proceeds of the sale. Her children also conveyed their interests. She took possession of this farm immediately after her father's death, and always treated it as her property, subject only to the life estate of her mother, and the remainder over to her children, and she and her husband made valuable improvements upon it. Emily assisted her mother in the management of the property, and it seems to have been her idea, as well as her mother's, that the several devisees in her father's will vested upon his death. Acting upon this idea, she executed the two mortgages upon her portion. She also executed a will on May 2, 1868, in which she devised all her estate which she had inherited or might inherit to her husband during his life, with remainder over to her brother and sisters and their heirs, and all her property not acquired by inheritance, absolutely to her husband and his heirs. Josephine, under the same impression, disposed of her property. It is also evident that Louis had the same understanding of the will, and acted upon it. He was a priest at Notre Dame, Indiana, and says he took but little interest in the estate, acting entirely upon the suggestions of Emily and his mother, and executed the deeds and papers they sent him, and taking what money they chose to send him without question. But he knew of the mortgages executed by Emily, and made no protest against them. On February 20, 1888, he wrote a letter to De Broux, who is also a Catholic priest, in answer to one received from him, claiming that Emily's husband had used all the money received from the loan secured by the five-thousand-dollar mortgage. From this letter it would appear that De Broux was seeking payment of the mortgage from Emily's estate, Louis being the executor of her will, or from Louis and the mother. Louis in his letter says that he had delayed writing in order that he might get the advice of a learned professor at Notre Dame, and that the advice he received coincided with his own views. He concludes this letter as follows:—

"As you can well understand, neither I nor any member of our family is responsible; nor can I in justice, nor in conscience, be bound to pay one cent, either of interest or capital, of any moneys which Mrs. Henquenet borrowed, since Mr. H. has received it all for his own benefit. I do not know how the mortgage is made. I would indeed be sorry that any one should lose anything through my fault, and I do not see any other method to get back the money you lent except by foreclosure on the property in Detroit. Of course, only Emily's share in that property could be attacked, and if there was not enough there, she had a half share in a lot and house in Mt. Clemens. Mr. Henquenet has acted in all this in a most unjust manner towards our family; for the Detroit property was devised to him only for his lifetime, and then it was to revert to the family. How can he, as a Catholic,

be safe in conscience? As long as my mother lives, she has a right to all the revenues of the Detroit property. We had not the means to take up the mortgage, and if we had it would be folly for us to do so, as Mr. H. could play the gentleman at our expense as long as he lives. Mr. H. is obliged to pay the interest on the money he got, and if he refuses, what remains to be done is, I presume, to foreclose on that property that was mortgaged. If Mr. H. could succeed, he would gladly grab every cent of the family. If he has thirty thousand dollars' worth of property in Hope, he is indebted to our family for it. But he is not thankful for this. He pretends that we have done nothing for him. May God forgive him. I presume it would be advisable to see Mr. Otto, whom I appointed to replace me, in regard to my sister's affairs. I will send him a copy of your letter, and will tell him of my writing to you. I hope, Rev. Father, that the parties who hold the mortgage will not suffer any loss, nor you either. I understand that Fr. Ryckaert has a mortgage on that property for two thousand dollars.

"Wishing you all blessings, I remain your sincere friend in the Sacred Heart.

L. J. L'ETOURNEAU, C. L. C."

This letter shows conclusively that he then understood the will as Emily understood it, although in his testimony he attempted to convey the impression that he had no thought or understanding about it until he took legal advice some time afterwards, when he thought Mr. Henquenet was becoming aggressive.

It therefore appears conclusively that all the family, for twenty-eight years, have understood and interpreted the will as the defendants now contend that it should be construed, and have uniformly acted upon such understanding and interpretation until within a short time before the filing of this bill. Louis and Josephine ought to be estopped in equity from now placing a different construction upon this will, — one that will declare these mortgages void, and leave the innocent holders of them without any remedy, except against the estate of Emily, which amounts to but little, if anything, outside of the property which she supposed she inherited from her father. If the language of the will were so clear that the construction claimed by the complainants must prevail, there should be no hesitation, under the rule that he who seeks equity must do equity, to leave the matter where these adult heirs have left it by this family arrangement and understanding for over a quarter of a century. We are satisfied that the proper construction of this will is as the mother and children construed it in the first place.

If it were not for the eighth clause of the will, there would be no doubt but that on the testator's death, the fee of the property would have vested in these three girls, subject only to the life estate of their mother. The intent of this clause as it stands is not clear and certain. Complainants' counsel contend that the word "or" in the clause "or my said wife" must be read "and." I think that the sentence was intended by the testator as follows: "And whereas, one or more of my said children may not survive me, or my said wife may not survive me, I hereby order," etc. In considering that some of the children might die before he did, the thought also occurred that his wife might not survive him. The awkwardness or incompleteness of the expression may have been that of the scrivener, and not of the testator's intention. In this connection, it is worthy of notice that the same person draughted the will of Timothy, who had nothing to devise in his father's estate if the construction of his father's will be as contended for by the complainants. The intention of the testator, ascertained from the will, looking to the whole of it, and reading it in the light of the surroundings of the testator at its date,

is to be given full effect, if lawful. It is not to be supposed that the testator intended to disinherit the children of his children, if any child of his, living at his death, should die before the wife and mother did. He is very particular to state why he wills no more to his grandchild Margaret. Josephine was married and had two children. Did he intend to disinherit them if their mother died before his wife did? On the contrary, he evidently intended that the property devised to Josephine should go at her death to the heirs of her body. The omission of the word "assigns" in Josephine's case clearly shewed an intention that she could not dispose of the farm without her children's consent, and under this idea they joined with her in conveying it when she sold it. Yet if Josephine had died before her mother, under the complainant's theory her children would have been disinherited.

It is the policy of our law not to disinherit heirs, unless it clearly and distinctly appears that such was the purpose of the testator. The law also favors vested estates, and a remainder is not to be construed as contingent when it can consistently be construed to be vested. A will speaks from the testator's death, and legacies then vest, unless a contrary intent is clearly indicated in the will: *Eberts v. Eberts*, 42 Mich. 404; *Rood v. Honey*, 50 Mich. 395; *Toms v. Williams*, 41 Mich. 552; *Rivenett v. Bourquin*, 53 Mich. 10; *Union Mutual Association v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519; *Porter v. Porter*, 50 Mich. 456; *McCarty v. Fish*, 87 Mich. 48. We think the language of Mr. Justice Campbell in *Rood v. Honey*, 50 Mich. 395, is applicable to the will before us, and that it controls this case. In this view of the intent and construction of the will, the court below was correct, and found in its decree that the interest of Eleanor, at her death, descended in equal shares to her mother, Louis, Emily, Sarah, Josephine, and Margaret. The mother having died and devised the property to Louis, Sarah, and Josephine, the decree fixes the title at the time of the submission of the case as follows: Emily's estate, twenty-one fifty-fourths; Sarah's estate, twenty-two fifty-fourths; Louis, four fifty-fourths; Margaret, three fifty-fourths; Florence Brewer, two fifty-fourths; and Horace Brewer, two fifty-fourths. The mortgages given by Emily were decreed to be a valid lien upon an undivided twenty-one fifty-fourths of the property; that the twenty-one fifty-fourths belonging to Emily's estate passed in equal shares of seven fifty-fourths to Sarah, Josephine, and Louis, subject to the life estate of August Henquenet. The court also found that the Brewer children, through Mrs. Paquette's deed to Morton, under whom they claim, were entitled to so much of her share of Emily's interest in the premises as was equal to one twelfth of the same. The decree should be affirmed with costs.



## PARTRIDGE v. HEMENWAY.

[89 MICHIGAN, 454.]

**MORTGAGE, REMOVAL OF BUILDING SUBJECT TO, WITHOUT MORTGAGOR'S CONSENT, DOES NOT DESTROY LIEN.** — Where, before the assignment of a mortgage to a *bona fide* assignee, the mortgagor, without the consent of the mortgagee or assignee, removes the buildings from the mortgaged premises to another lot owned by his wife, which she afterwards conveys by a quitclaim deed, such buildings will still remain subject to the encumbrance of the mortgage, and may be sold upon its foreclosure, if the land does not bring enough to satisfy the mortgage debt.

**BILL to foreclose a mortgage.** The opinion states the case.

*James M. Goodell*, for the complainant.

*A. R. McBride*, for the appellants.

LONG, J. This bill was filed to foreclose a mortgage given by Hiram F. Hemenway and wife. At the time the mortgage was executed upon lots 9 and 10, some buildings were situated thereon, which were thereafter removed. The testimony abundantly shows that the two lots were only of the value of about fifty dollars at the time the mortgage was given, aside from the buildings, and are worth no more now. No question is raised but that J. F. Partridge and Brother paid full value for the mortgage, — four hundred dollars, — and that it was assigned to the complainant for value. At the time she took it the property was not of greater value than the mortgage. No showing is made that she ever consented to the removal of the buildings from these lots, and she denies ever hearing that Hemenway contemplated removing them. The first she heard of the removal was after they had been removed and placed on lot 2, which defendant Hartwell thereafter purchased. The contract entered into by J. F. Partridge and Brother, set out in the opinion of my brother Morse, was to reduce the amount of the principal in the mortgage on condition that certain monthly payments were made. This was not kept by Hemenway. I am unable to see how this contract should be construed as an assent on complainant's part to the removal of the buildings. Nothing of the kind is said in the contract, and if there were, the contract was not performed by Hemenway. I am satisfied from the testimony and the surrounding circumstances that Mr. J. F. Partridge never consented to the removal of these buildings. He testifies that he never consented thereto, and it is impossible to believe that

he would waive complainant's right to a lien upon the buildings while nearly four hundred dollars yet remained due upon the mortgage, and accept the two lots valued at fifty dollars in lien thereof.

The case is then presented whether the *bona fide* assignee of the mortgage shall lose her lien by the removal of these buildings upon a lot, the title to which was afterwards acquired by defendant Hartwell by a quitclaim deed. No one would claim, if the fact be established, which I think is established, that the complainant or J. F. Partridge and Brother never consented to the removal of the buildings, and that Hemenway removed them without the knowledge or consent of these parties, that the complainant would lose her lien under the mortgage. Hemenway, the mortgagor, could not set up this claim, and Hartwell under his quitclaim deed stands in no better position.

The case is a peculiar one. It is contended that this is a litigation of the title to the property, which cannot be done in the foreclosure proceedings. The case of *Summers v. Bromley*, 28 Mich. 125, is cited. I do not think the case falls within the principles laid down in that case. The buildings were covered by the lien of the mortgage before they were removed. This is not disputed. The defendant Hartwell was made a party defendant by reason of his claim as subsequent purchaser or encumbrancer.

The court below decreed that the buildings were still encumbered by the mortgage, and I think correctly so held; and that they be sold if the lots did not bring enough to satisfy the mortgage.

The decree must be affirmed.

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MONSE, J., delivered a dissenting opinion, of which the following is a synopsis: Hemenway swears that the removal of the building on the mortgaged premises was made with the consent of Partridge and Brother, and there are strong circumstances tending to show that such was the case. They, however, deny that they consented. On the 12th of May, 1887, Carrie E. Hemenway, by quitclaim deed, conveyed the land upon which this building had been moved to Willis H. Stevens, who, on the 31st of December, 1887, quitclaimed it to the defendant James H. Hartwell. The bill alleged that this building was still subject to the lien of the mortgage; that it constituted the principal security of the mortgage; that it was removed without the knowledge or consent of the mortgagees or complainant; and that Hemenway is insolvent, and the note given by him worthless and uncollectible. Hartwell in his answer claims to have had no knowledge or intimation that the building when he purchased it had been removed from lots 9 and 10, but sup-

posed that it had been built on lot 2, and there is no testimony tending to show that his answer and evidence in this respect are not true. Complainant's counsel insists that Hartwell does not stand in the relation of a bona fide purchaser of this building, because he acquired the land through a quitclaim deed, and cites in support of this contention, among other cases, that of *Peters v. Cartier*, 80 Mich. 125, 20 Am. St. Rep. 508, where it was held that the grantee in a quitclaim deed takes only the interest that the grantor has in the premises. The defendant claims that his title to the premises — the building now standing upon his lot — cannot be litigated in these proceedings, and that the decree, in so far as it undertakes to establish a lien upon this building, is wrong, and should be vacated. This claim seems to be well founded, according to the opinion of the court in *Summers v. Bromley*, 28 Mich. 125. If the rule laid down in that case applies, the bill is not properly framed to raise the issue made in the proofs under the answer of defendant Hartwell, or to support the decree against the building.

But the decree is wrong upon the equities of the case. The building was removed in the early part of 1883. J. F. Partridge, who did all the business for Partridge and Brother in connection with this mortgage, and who is the husband of complainant, knew of the removal as early as 1884. Since the assignment to his wife he has acted as her agent in relation to this mortgage. After the assignment this agreement was entered into between J. F. Partridge and Brother and Hemenway: —

"This certifies that J. F. Partridge and Brother, of Flint, Genesee County, Michigan, hereby agree to and with Hiram F. Hemenway, of Bancroft, Michigan, that they will accept the sum of two hundred dollars in full payment of a mortgage dated August 15, 1879, for the sum of four hundred dollars, providing, and upon the express understanding, to wit, that the said Hemenway shall pay the sum of ten dollars per month, with interest at seven per cent, or more, at the option of said Hemenway, every month hereafter until the said sum of two hundred dollars is paid in full; payments to be made at the bank of L. M. Strong and Son, in Bancroft, Michigan. It is hereby expressly agreed and understood by and between the said parties that if the said Hemenway should fail to pay the said sums, as heretofore mentioned, at the time and place above mentioned, then this agreement shall be null and void, and of no effect, and the payments which may have been made shall only be as indorsements in the original amount mentioned in the above-described mortgage.

"Dated July 22, 1886.

"J. F. PARTRIDGE AND BROTHER.

"H. F. HEMENWAY."

One hundred dollars was paid upon this agreement. The terms of this agreement would look as if the complainant had abandoned her claim of lien upon this building, and corroborate Hemenway's testimony that the removal was consented to by J. F. Partridge and Brother. Under the circumstances, it would be inequitable to give the complainant a lien upon this building as against Hartwell. The decree of the court below, in so far as it does so, should be reversed and vacated, with costs of both courts to the defendant Hartwell.

THE DOCTRINE OF THE PRINCIPAL CASE seems to be correct on principle. The mortgage lien upon a house removed from mortgaged land without the mortgagee's consent continues in force upon the house as to all persons who have notice, but cannot attach to other land upon which the house was subsequently placed. Such house will be ordered sold in case the proceeds of

the mortgaged land are insufficient to satisfy the mortgage, but not otherwise: *Hamlin v. Parsons*, 12 Minn. 108; 90 Am. Dec. 284. Under a statement of facts somewhat similar, in *Verner v. Betts*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387, where a house situated upon mortgaged land, and subject to the lien of the mortgage, was severed and sold by the mortgagor in possession, having the legal title to the premises, to a *bona fide* purchaser without notice, the court properly decided that the mortgagee's lien upon the house in equity was gone, and that his only remedy was by an action at law against the mortgagor to recover damages for impairing his security. The latter case should, however, be distinguished from *Hamlin v. Parsons*, 12 Minn. 108, 90 Am. Dec. 284, in which the severed house was sold by the mortgagor, not to an innocent purchaser, but to a purchaser with notice. In the principal case, the mortgagor severed the house from the mortgaged premises and removed it to the land of his wife, who subsequently conveyed it by a quitclaim deed, the grantee under which cannot be considered a *bona fide* purchaser: *Peters v. Cartier*, 80 Mich. 124; 29 Am. St. Rep. 503, and note; which brings the case within the rules laid down in *Hamlin v. Parsons*, 12 Minn. 108, 90 Am. Dec. 284, and distinguishes it from *Verner v. Betts*, 46 N. J. Eq. 256; 19 Am. St. Rep. 387. The principal case is, however, in direct conflict with *Buckhout v. Swift*, 27 Cal. 433, and *Hill v. Gurn*, 50 Cal. 433, declaring that if a house or other fixture is removed from mortgaged premises, whether by the act of God or of man, it is thereby freed from the mortgage lien; and that it is not material that a person to whom it was sold purchased with knowledge of all the circumstances. A more unreasonable rule, or one better calculated to encourage the spoliation of mortgaged realty, <sup>44</sup> would be difficult to conceive.

CASES  
IN THE  
SUPREME COURT  
OF  
MINNESOTA.

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OAKES v. ROGERS.

[47 MINNESOTA, 33.]

**FINAL JUDGMENT.** — An agreement to pay a certain sum when a question is determined in a designated manner must be construed as requiring the decision to be final, and therefore no action upon the agreement can be sustained while the right of appeal exists.

*H. Barton*, for the appellant.

*B. J. Shipman*, for the respondent.

VANDEBURGH, J. The note in suit was given for part of the purchase price of certain real estate upon which one Simpson claimed a lien by virtue of a judgment against the owner for a similar amount. By a contemporaneous agreement (of which the plaintiff, indorsee of the note, had due notice) made between the parties to the note, the liability of the defendant was conditioned upon the satisfaction of such judgment, or a judicial determination that it was not a lien on the land, which condition was expressed in the agreement as follows: "Now, therefore, if said judgment is satisfied, or the question as to whether it is a lien on said property is decided, and said decision is to the effect that said judgment is not a lien on said property, then said note is to remain in full force, and shall be collected by said executor; otherwise said Rogers is to pay that amount, namely, \$171, on said judgment." Evidently, the object was to secure Rogers against the liability to pay the judgment if he paid the full purchase price, and so that part of the purchase-money evidenced by the note was not to be paid over to the vendor of the land until the question of the

**Lien of the judgment upon the land was determined.** In view of the object of the contract, the parties must be held to have intended a final and conclusive determination of the question. A judgment adversely to the claim of the judgment creditor claiming a lien upon the premises by virtue of the judgment in question was duly entered on the twenty-second day of April, 1890. This action to recover the amount due on the note in suit was commenced in May, 1890, in the municipal court of St. Paul, and was tried and finally submitted June 7, 1890. The court found that the suit was prematurely brought, and that plaintiff was not entitled to recover, for that reason, because, at the time of its commencement, the defendant in the action to determine the lien of the judgment on the premises in question still had the right to appeal, and the question of the final determination of his rights under that judgment had not, therefore, been finally determined, nor had the judgment been satisfied. It was not, therefore, safe for the defendant in this action to pay the note until the time to appeal had passed. As already stated, we think this was the proper construction to be placed upon the contract. A decision which is open to appeal, and upon the stability of which the liability of a party must depend, can hardly be said to determine the matter in controversy while the right of appeal continues. The judgment in question was final as to the district court in which it was rendered, but was not final as to the subject-matter when this action was tried. It was not final as to the land or the rights of the parties until the time to appeal had expired. "The last decree of an inferior court is final in relation to the power of that court, but not in relation to the property itself, unless it be acquiesced in": *United States v. Schooner Peggy*, 1 Cranch, 103, 109; *Hills v. Sherwood*, 33 Cal. 474. Whether, if the action, though commenced before, had not been tried till after, the time to appeal had expired, and no appeal taken, such acquiescence might not then have been shown to establish the final and definitive character of the judgment of the district court is a question not arising, and need not be answered here.

Order affirmed.

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**FINAL JUDGMENT.** — "A judgment may be final so as to authorize an appeal from the court in which it was rendered, without being final as to the subject-matter in litigation. An appeal may be taken, in which case the judgment of the inferior tribunal is not final as to the subject-matter, because it may be changed by the appellate court. Thus a covenant in a deed,

that if the title to certain lands were not confirmed to the covenantor by the courts of the United States, before which it was pending, upon final adjudication of the same, the covenantor would pay a sum of money, does not become a cause of action when the district court refuses to confirm the title and declares it invalid. Until the time for appeal has elapsed, or until the judgment of the highest court in which the suit could be determined has pronounced against the validity of the title, there has been no such final adjudication as was intended by the parties to the covenant"; *Freeman on Judgments*, 4th ed., sec. 21.

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## MACDONALD v. FIRST NATIONAL BANK.

[67 MINNESOTA, 67.]

**INSOLVENT LAWS — PREFERENCE IN FAVOR OF NON-RESIDENTS.** — A transfer to a creditor, which is void by the laws of the state relating to insolvents as an unlawful preference, cannot be enforced by him on the ground that he is a non-resident of the state, and therefore not affected by such laws.

**INSOLVENT LAWS ENACTED BY A STATE OPERATE AGAINST NON-RESIDENTS** so far as such laws control the disposition of property within the jurisdiction of the state, though they cannot release the insolvent from the obligation to pay debts due from him to persons not resident in the state.

*W. A. Sperry and Lewis L. Wheelock*, for the appellant.

*J. L. Macdonald*, for the respondent.

DICKINSON, J. This action by the assignee (under our insolvent law) of an insolvent debtor is for the purpose of avoiding a transfer of personal property executed in writing by the insolvent to the defendant, a creditor, as security for the debt. The conditions under which this was made were such that by force of the insolvent law, it was avoided by the insolvency proceedings as an unlawful preference, unless that result is affected by the fact that the defendant thus preferred was a non-resident of the state. The contract was made in this state, and the property in question was and still remains here. The defendant (appellant) disclaims making any attack upon the validity of the law, or of the assignment; but relies upon the proposition that by reason merely of its non-residence, the insolvent law had no effect to avoid its contract.

This position of the defendant cannot be sustained. The contract in question, made in this state concerning property here, and to be executed here, was subject to the law under which it was made. Its legal effect in no respect depended upon the residence of the parties. The law under which it was made declared that under certain specified conditions

(which are found to have existed), such a contract should be void, — legally ineffectual as a transfer of the property. The legal effect of invalidity followed from the conditions specified in the law, and which the parties must be deemed to have had in contemplation. That law makes no exception in favor of non-residents entering into such contracts here. The property is still here, subject to our jurisdiction. As to that property, the court is exercising its jurisdiction in the enforcement of the law under which the contract was made. This enforcement of the law, by the legal appropriation of the property within our jurisdiction to the payment of the debts of the insolvent, does not involve the giving of an extraterritorial effect to the statute.

The appellant relies, in support of its contention, upon *Ogden v. Saunders*, 12 Wheat, 213, and other decisions of the same court, and upon what is said in *Wendell v. Lebon*, 30 Minn. 234. But a later decision of the supreme court of the United States removes whatever seeming support the language of prior decisions may have afforded for such a proposition as that here contended for: *Denny v. Bennett*, 128 U. S. 489. That was an action for conversion, prosecuted by the assignee of an insolvent debtor against the United States marshal, who, after the assignment under our insolvent law, and after the assignee had acquired actual or constructive possession of certain personal property embraced in the assignment, seized the same by virtue of an attachment issued out of the circuit court of the United States, in an action against the insolvent by non-residents of this state. The plaintiff recovered judgment in this court (*Bennett v. Denny*, 33 Minn. 580), which was affirmed in the supreme court of the United States. That court stated the principal question to be decided as being whether our insolvent law was repugnant to the constitution of the United States so far as it affects citizens of other states. The argument of the plaintiff in error was to the point (aside from that based on the doctrine of the inviolability of contracts) that such a statute can have no extraterritorial operation, and cannot, therefore, be binding on creditors living in a different state from that of the debtor and of the *situs* of his property; and that is the point of the appellant's argument in this case. The court, referring to its former decisions, including *Ogden v. Saunders*, 12 Wheat. 213, said (p. 497): "The proposition lying at the foundation of all these decisions is, that a statute of a state, being without force in any other state,



cannot discharge a debtor from a debt held by a citizen of such other state. . . . The substance of the restrictive principle goes no farther than to prohibit, or to make invalid, the discharge of a debt held by a citizen of another state than that where the court is sitting, who does not appear and take part, or is not otherwise brought within the jurisdiction of the court granting the discharge. In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation of a contract which he owes to a resident of another state who is not personally subjected to the jurisdiction of the court. Any one who will take the trouble to examine all these cases will perceive that the objection to the extraterritorial operation of a state insolvent law is, that it cannot, like the bankrupt law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the state, so far as it does not impair the obligation of contracts, is conceded; but the power to release him, which is one of the usual elements of all bankrupt laws, does not belong to the legislature where the creditor is not within the control of the court. The Minnesota statute makes no provision for any such release. The creditor who became such after the statute was passed cannot complain that the obligation of his contract is impaired, because the law was a part of the contract at the time he made it." This decision recognizes our insolvent law as being effectual as to the non-residents as well as to residents of the state, so far as it controls the disposition of property within our jurisdiction. The decision in *Wendell v. Lebon*, 30 Minn. 234, is to the same effect, and is an authority opposed to the contention of the appellant here.

Judgment affirmed.

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**INSOLVENCY — PREFERENCES.** — Ordinarily, an assignment of personalty valid by the laws of the state where made is valid everywhere, but an exception exists to this rule when a transfer giving preferences to a creditor is made in another state, of property in a state where such preferences are prohibited: *In re Dalpay*, 41 Minn. 532; 16 Am. St. Rep. 729, and note. In the case of *In re Howe*, 38 Minn. 403, where proceedings were had with reference to a preferential conveyance made by a non-resident insolvent, of property in Minnesota, it was decided that the validity of the conveyance must be determined by the laws of Minnesota, where the proceedings were instituted and the property situated, and not by the laws of the domicile of the debtor, where the conveyance was executed.

**INSOLVENT LAWS, OPERATION OF.** — States cannot pass laws concerning insolvency having the effect to discharge the obligations of contracts made elsewhere: *Lowenberg v. Levine*, 93 Cal. 215. The insolvent laws of Maryland profess to operate upon all claims, wherever arising, of both resident and non-resident creditors, but with respect to non-resident creditors their effect is controlled by the constitution of the United States: *Frey v. Kirk*, 4 Gill & J. 509; 23 Am. Dec. 581. As to the extraterritorial effect of insolvent laws, see *McChure v. Campbell*, 71 Wis. 350; 5 Am. St. Rep. 220, and note.

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## HEBERLING v. JAGGAR.

[47 MINNESOTA, 70.]

**EXECUTION SALE OF PROPERTY UNDER A WRIT AGAINST ONE WHO IS NOT ITS OWNER**, though it is levied upon while in his possession, cannot divest the title of the true owner.

**CONVERSION.** — **INNOCENT PURCHASER OF PROPERTY AT AN EXECUTION SALE**, under a writ against one who is not its owner, is guilty of its conversion if he takes possession of it in pursuance of the sale, and afterwards sells it to a third person.

*Sheehan and Cannon*, for the appellant.

*Thompson and Taylor*, for the respondent.

DICKINSON, J. This is an action for the conversion of an office desk. At the trial, in the municipal court of St. Paul, the action was dismissed when the plaintiff rested her case. The plaintiff showed a purchase of the property by her from one Ogden in 1889, and that she authorized on John M. Heberling, her brother-in-law, to sell it for her, and it was in his possession when, as the defendant claims, in October, 1890, it was seized under an execution as the property of John M. Heberling, and sold under the execution, the defendant being the purchaser; and he afterwards disposed of the property by sale. This made a case upon which the plaintiff was entitled to recover. The statute of frauds is relied upon by the respondent as affecting the plaintiff's title; but that has nothing to do with the case. The defendant traces no right of property back to the plaintiff's vendor, Ogden, and the fact that the property remained in the possession of Ogden for some months after the sale raised no legal presumption against the plaintiff's title. The fact was shown of the sale to the plaintiff by Ogden, that the property had been delivered by the seller, and was in the possession of John M. Heberling as agent of the plaintiff, or as bailee for her, when it is claimed to have been levied upon as the property of the latter. The right of the

owner, other than the defendant in the execution, to recover against the purchaser at the execution sale is not affected by the fact there was never any affidavit of title served upon the officer, as specified in the General Statutes of 1878, chapter 66, section 154. That statute was intended for the protection of the officer in the discharge of his duties. Its provisions do not extend so far as to protect the purchaser at the execution sale, and it has no application or effect in this case. By the sale under the execution against the property of John M. Heberling the plaintiff's title was not divested. The defendant in the execution had no title, the plaintiff owning the property, as the case shows. There was no legal authority for the sale of her property, and the purchaser not only acquired no rights by the sale, but having assumed to deal with the property as his own, by taking possession of and selling it, he became liable to the true owner as for a conversion: *Champney v. Smith*, 15 Gray, 512; *Bryant v. Whitcher*, 52 N. H. 158; *Coombs v. Gorden*, 59 Me. 111.

Order reversed.

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**EXECUTION SALES — PURCHASER'S TITLE.** — The sale of property under an execution passes only the right, title, and interest of the judgment debtor. If he has no interest, none passes by the sale to the purchaser: *Lewart v. Carter*, 117 Ind. 206; 10 Am. St. Rep. 40, and note; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 388; *Eabriele v. Meade*, 2 Nev. 285; 90 Am. Dec. 542, and note.

**CONVERSION BY VENDEE OF PROPERTY SOLD WITHOUT AUTHORITY.** — As to when an innocent purchaser of property may be deemed guilty of conversion, see note to *Bolling v. Kirby*, 24 Am. St. Rep. 797, 798. The sale of a whole crop under an execution on a judgment against the tenant, where the land is leased on shares, is a conversion for which the purchaser is liable, as well as the constable who makes the sale: *Cass v. Hart*, 11 Ohio, 364; 38 Am. Dec. 735; and to the same effect substantially is *Jamison v. Hendricks*, 2 Blackf. 94; 18 Am. Dec. 131; for monographic note on conversion of personalty, see *Bolling v. Kirby*, 24 Am. St. Rep. 795-819.

**SALES — PURCHASER FROM ONE WITHOUT TITLE.** — As to the rights and liabilities of one who becomes the purchaser of property sold by one who has no title thereto nor authority to sell it, either at private or judicial sale, see extended note to *Velsian v. Lewis*, 3 Am. St. Rep. 195-206.

## BOWEN v. CITY OF MINNEAPOLIS.

[47 MINNESOTA, 115.]

**STATUTES, WHEN DIRECTORY AND WHEN MANDATORY.** — When, by statute, power is given to public officers, and the public interests and individual rights call for its exercise, the language used, though permissive in form, is, in effect, peremptory.

**STATUTE IS MANDATORY** when it authorizes and empowers a city council to pay certain sums with interest to specified claimants whom the city is under a strong moral obligation to pay. The effect of the statute is to make the claims legal, and to confer upon the claimants the right to insist upon the payment both of the principal and of the interest.

**INTEREST.** — ACCEPTANCE OF THE PRINCIPAL of a sum to which a claimant is entitled from a city will not preclude him from recovering the interest due thereon, when he claims such interest at the time, and its payment is refused by the city officers, under their erroneous opinion that the statute gives them the right to pay such interest or not as to them seems proper.

*Robert D. Russell*, for the appellant.

*Healy and Miller*, for the respondent.

**COLLINS, J.** We assume, in the determination of this case, that plaintiff, respondent, because of his failure to regularly enter into a contract with the defendant city, was remediless until the enactment of the Special Laws of 1889, chapter 563, and place an affirmance of the order appealed from upon what we regard as the proper construction of that statute. It was entitled "An act legalizing certain claims against the city of Minneapolis, and authorizing the payment of the same." In the first section is found a preamble, wherein it is recited that in the year 1887 this plaintiff and other persons rendered services for the use and benefit of said city, by grading certain streets under the supervision and direction of its engineer, which grading had been accepted and used by the municipality; that the council had thereafter determined the amount due plaintiff, and by a resolution adopted August 10, 1888, ordered its payment. Following this preamble, in sections 2 and 3, the city council was "authorized and empowered" to order payment and to pay the amount, with interest from the day last mentioned; and by the subsequently appearing paragraphs of section 3, the city clerk was also "authorized and empowered" to draw the necessary orders, the mayor to sign, the comptroller to countersign, and the city treasurer to pay the same on presentation. The council duly caused the principal sum to be paid, but refused to allow interest, taking the

position that the language used in chapter 563, was permissive, not mandatory, and that payment of any portion of plaintiff's claim, either principal or as interest, was entirely within its discretion. The right to recover this interest is now presented, and a solution of the question involves an interpretation of the statute, — an ascertainment of the legislative intent when using the term "authorized and empowered." It is very clear from the facts as found, as well as from the recitals in the law, that the defendant city was under a strong moral obligation to pay the amount of plaintiff's claim, and that, through its representatives, this obligation had been recognized on more than one occasion. Undoubtedly payment would have been made soon after the adoption of the resolution of August 10, 1888, but for judicial proceedings which intervened, wherein a temporary injunction prohibiting such payment was obtained and served upon the council and other city officers, — an injunction which remained in force until after the passage of chapter 563, when the court, expressly recognizing the power of the law-makers to authorize or compel the payment of plaintiff's claim, dissolved and vacated it.

There is no universal rule by which directory provisions in a statute may, under all circumstances, be distinguished from those which are mandatory, and an examination of the adjudicated cases simply tends to confuse the examiner. In the case of *Howard v. Bodington*, 2 Prob. Div. 203, Lord Penzance stated (p. 211) that in his belief, as far as any rule was concerned, one "cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision, . . . and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect, decide whether the enactment is what is called imperative or only directory." Again, in a case where the words used were merely permissive, it was said: "The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interests or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is

giver as a remedy to those entitled to invoke its aid, and who would otherwise be remediless": *Supervisors v. United States*, 4 Wall. 435, 446. Guided by these views, and applying them to the circumstances in hand, we think there is little difficulty in arriving at the legislative intent when the enabling or permissive words were used. The defendant was morally bound to pay plaintiff's claim, and this moral obligation stood unquestioned. The purpose of the legislators was to make it a legal claim, and the power which was conferred upon the council and upon other municipal officers in permissive terms was not for their benefit, but for the plaintiff's. Among other things about the act itself indicating the purpose may be mentioned the use of the word "legalizing" in the title, and the recitals in section 1. Again, the same permissive words were used with reference to the city clerk, the mayor, the comptroller, and the treasurer; and we do not suppose any one would urge that either of these officers could evade the performance of a duty, after the council had allowed the plaintiff's claim, by contending that, as to him, the words were permissive and enabling only. In conclusion, upon this inquiry as to whether there was any discretion vested in the officers of the defendant city under the act of 1889, we call attention to a case strictly analogous in principle, and in which these same words appearing in a statute of like character were construed as compulsory, and not merely enabling: *People v. Supervisors of Herkimer Co.*, 56 Barb. 452.

It must be admitted that if it was imperative upon the council to audit and make payment of the principal amount, it was also required to allow and pay interest thereon from the day specified in the act.

Upon the facts as they appeared at the trial, there is nothing in the point that plaintiff cannot recover, because he accepted payment of the principal: *Duluth Chamber of Commerce v. Knowlton*, 42 Minn. 229.

Order affirmed.

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**STATUTES.** — For the distinction between mandatory and directory statutes, see *State v. Ellet*, 47 Ohio St. 90; 21 Am. St. Rep. 772; *Willy v. Mulledy*, 78 N. Y. 310; 34 Am. Rep. 536; *Clark Civil Township v. Brookshire*, 114 Ind. 437; *Gunter v. Texas Land etc. Co.*, 82 Tex. 496; *Ex parte Liddell*, 93 Cal. 633. As to when "may" in a statute will be construed to be synonymous with "shall" or "must," see *Bansemmer v. Mace*, 18 Ind. 27; 81 Am. Dec. 344, and note; *State v. Police Jury*, 40 La. Ann. 755; *Kohn v. Hinshaw*, 17 Or. 306; *McLeod v. Scott*, 21 Or. 94.

ACCORD AND SATISFACTION. — The acceptance of a smaller sum does not ordinarily bar a demand for a greater: *White v. Kuntz*, 107 N. Y. 518; 1 Am. St. Rep. 886; *Ross v. Hall*, 26 Conn. 392; 68 Am. Dec. 402; *Twitchell v. Shaw*, 10 Cush. 46; 57 Am. Dec. 80; *Martin v. Franks*, 127 Pa. St. 389; 14 Am. St. Rep. 359; *Jaffray v. Davis*, 124 N. Y. 164.

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## LEITHAUSER v. BAUMEISTER.

[47 MINNESOTA, 151.]

**PARTNERSHIP — AGREEMENT BY PARTNER TO PAY DEBTS OF.** — If a partnership is dissolved, and one of its members agrees to discharge all its liabilities, a note subsequently executed by him in the firm name, in consideration of a pre-existing partnership indebtedness, extending the time for its payment, cannot be enforced against his copartners if the payee knew of the existence of the agreement, because after such agreement the position of the other partners was that of sureties to the partner who had agreed to pay the debt, and the creditor should not be allowed to make a new contract extending the time of payment without their consent. The new note is therefore binding only upon the partner who executed it.

*A. G. Briggs*, for the appellants.

*F. W. Zollman*, for the respondent.

DICKINSON, J. Prior to November 30, 1887, the three defendants were copartners, engaged in business under the name of John Comes & Co., and as such copartners they were indebted to a partnership firm (Matt Leithauser & Co.), to whose rights the plaintiff has succeeded, in the sum of \$280. The partnership was dissolved at the time above stated. This action is to recover on that indebtedness. The defendants Naegler and Baumeister plead in defense that by a contract between the defendants at the time of the dissolution, Comes became obligated to pay this debt; that after the dissolution Comes formed another partnership with one Schneider, under the same partnership name as that of the former firm, John Comes & Co., all of which, as is alleged, was known to the plaintiff; and that he accepted from Comes a promissory note of the new firm, signed in its partnership name, payable ninety days thereafter, in satisfaction of the indebtedness of the defendants.

The court found in general terms that, except as to the allegation of the dissolution of the defendants' partnership, the allegations of the answer were not proved. This finding was erroneous in some particulars, and it cannot be said that the

erroneous conclusion may not have affected the decision of the case. The evidence conclusively showed, and without dispute, not only that the partnership of the defendants had been dissolved when (as the fact is admitted to have been) the plaintiff, in February, 1888, took from Comes a note, signed in the partnership name of that firm, for the amount of the debt, payable ninety days after date, with interest at the rate of eight per cent per annum, but that a settlement had been made between the copartners, and an agreement entered into, which, as between themselves, obligated Comes to pay this partnership debt to the plaintiff. Moreover, the evidence on the part of the defendants (appellants) went to show that the plaintiff had been informed of this fact, and this is not really controverted in the evidence on the part of the plaintiff. On the contrary, he admits in his testimony that he "knew of the settlement they had," but did not know of the dissolution of the partnership. He admits that "Comes gave the note in the partnership name because he said he did not want to stand by his agreement with the other parties, because they did not stand by theirs. . . . He did not want to pay this claim all by himself, because they did n't live up to their agreement." We think that the case showed, contrary to the finding of the court, both that Comes had assumed the obligation, as respects the other defendants, of paying this debt, and that the plaintiff was informed of it when he took from Comes the note, in form expressing the obligation of the partnership, payable at a future day, at a rate of interest in excess of what the law would allow in the absence of express agreement. These facts are material. While such an agreement between the joint debtors, to which the plaintiff was not a party, could not prejudice him or affect his right of action against them all, yet it would affect the rights of the parties growing out of any new contract which he, having knowledge of such agreement between the defendants, might thereafter make with one of them. When Comes took upon himself the legal obligation of the defendants to pay this debt, they occupied towards him the position of sureties; and the creditor, knowing the fact, should not be allowed to make a new contract extending the time for payment without their consent: *Millerd v. Thorn*, 56 N. Y. 402; *Smith v. Sheldon*, 35 Mich. 42; 24 Am. Rep. 529; *Oakeley v. Pasheller*, 10 Bligh, N. S., 548, 589.

If the plaintiff knew that Comes had thus assumed the payment of this debt, he must be deemed to have known that the



mere general partnership relation, which he may have supposed to be still existing, did not authorize Comes to give the note of the partnership for a debt which had become his own personal obligation to pay. While the note, taken under those circumstances, would not be obligatory on the other defendants, it would be enforceable against Comes, and would be effectual, as between the plaintiff and Comes, as a new contract, to extend the time for the payment of the debt: *Wheaton v. Wheeler*, 27 Minn. 464; and that would release the other defendants (see authorities above cited), even though there be no proof as to what, if any, injury the sureties may have suffered: *Rees v. Berrington*, 2 Ves. Jr. 540; *Müller v. McCann*, 7 Paige, 451; *Calvo v. Davies*, 73 N. Y. 211, 216; 29 Am. Rep. 130. It may be that if the plaintiff had not known of the agreement between the defendants, and if he could be deemed to have supposed that the note was rightfully given as the note of the partnership, the result would have been different: *Agnew v. Merritt*, 10 Minn. 242 (308).

The finding of the court being, as we consider, erroneous in the particulars above stated, a new trial must be granted.

We observe a variance between the proof and the answer, in that the note given appears to have been intended to express the obligation of the defendants' former partnership, and not, as alleged, the obligation of a new partnership, of which Comes and Schneider were members. There was no evidence of the existence of any such partnership. It is not claimed that this variance is material, and probably it was not. It is only adverted to here so that any doubt concerning it may be avoided if thought necessary.

Order reversed.

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**PARTNERSHIP—POWER OF PARTNER AFTER DISSOLUTION.**—As to the power of one partner after dissolution of the partnership to bind his former copartners, see *Chardon v. Oliphant*, 3 Brev. 183; 6 Am. Dec. 572, and note; note to *Van Keuren v. Parmelee*, 51 Am. Dec. 330-332. A new note made by one partner in the firm name, and within the scope of the partnership business, and after dissolution, binds the firm until the payee of such note has notice of the dissolution: *Clement v. Clement*, 69 Wis. 599; 2 Am. St. Rep. 760, and note.

## GRAHAM v. BURCH.

[47 MINNESOTA, 171.]

**WILLS — THE REVOCATION OF A WILL** cannot be accomplished except by the performance of some one of the acts designated by the statute, and this rule continues applicable though such performance is prevented by some fraudulent device of a third person interested in the will.

**WILLS, DESTRUCTION PREVENTED BY FRAUD.** — Where a testator demanded his will for the purpose of destroying and thereby revoking it, and when it was given to him placed it, inclosed in an envelope, in a stove with kindlings not yet ignited, intending it to be destroyed when the fire should be lighted, but a person present, with a design of thwarting the purpose of the testator, and during his temporary absence, took the will out of the envelope and secreted it, and it was thereby saved from destruction without the knowledge or consent of the testator, it was held that the will had not been revoked.

**WILLS — REVOCATION.** — A CONVEYANCE SET ASIDE as having been obtained from the grantor by undue influence cannot operate as an implied revocation of his will.

**TRUSTS.** — A PROBATE COURT HAS NO JURISDICTION to determine whether a devise should be held in trust. Its functions are limited to inquiring and determining whether or not the instrument presented to it as the last will of the decedent was executed by him in the manner prescribed by statute, and when he was legally competent to execute it.

*John D. O'Brien and Armand Albrecht, for the appellant.*

*Thompson and Taylor, for the respondent.*

VANDEBURGH, J. Upon the eighth day of January, 1887, one James Burns, of the city of St. Paul, duly executed and published his last will and testament, whereby he devised his estate, consisting of a lot in the city of St. Paul, with buildings thereon, to his two daughters, who are the parties to this action. Upon his decease, Mrs. Burch, the defendant, who is named as executrix in the will, petitioned the probate court for its allowance. Her application was denied, and an appeal taken by the executrix to the district court, where, upon a full hearing, the court reversed the decision of the probate court, and directed the will to be admitted to probate.

The legal questions involved in the case arise chiefly upon the following facts found by the district court: After the execution of the will, the decedent demanded of Mrs. Burch, who had custody of the will, that it be delivered to him to be destroyed. Upon its delivery to him, he placed it, inclosed in an envelope, in a stove with kindlings not yet ignited, with the intention of destroying the will by burning when the fire should be lighted. The facts were found by the court as fol-

lows: 1. "This was done in the presence of said Bridget F. Burch, and with the express and actual intention on the part of said decedent to destroy said will by burning when said fire should be lighted. Said decedent then stepped for a moment out of the room, and thereupon said proponent Burch, fraudulently, and with the purpose of thwarting the said intention of decedent, and without his knowledge or consent, took the will out of the envelope, and secreted it, leaving the envelope in the stove, to all appearances as though it still contained the will. Within two hours thereafter the fire in said stove was lighted, either by said decedent or by said Burch, and said envelope burned. Said will was thereafter kept secreted by said proponent Burch, and the decedent ever after supposed the same had been then and there burned as he intended. Said will was not in fact revoked by any of the methods specified by statute." 2. "That on the sixth day of May, 1887, the deceased, James Burns, executed, acknowledged, and delivered to said Bridget Frances Burch, a deed of conveyance of the northerly seventy-five (75) feet of lot numbered one (1), in block numbered fifty (50), of Dayton and Irvine's addition to St. Paul, Ramsey County, Minnesota, being the same property given and devised by the decedent to the said Bridget Frances Burch in the third paragraph of the will of said decedent presented for probate in this proceeding; that said deed was afterwards, in an action brought in this court by said Mary Graham against said Bridget Frances Burch and others for that purpose, set aside, upon the ground that the same was procured by reason of undue influence and restraint exercised over said decedent by the said Bridget Frances Burch at the time of the execution thereof, and the judgment of this court in said action was duly entered accordingly."

The statutory provisions in respect to the revocation of wills are as follows (Gen. Stats. 1878, c. 47, sec. 9): "No will, or any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some will, codicil, or other writing, signed, attested, and subscribed in the manner provided for the execution of a will; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." In this case, the purpose of the testator to burn his will is clearly shown, but the will remains intact. It was

not scorched or mutilated in any degree. The testator did not persist in carrying out his expressed purpose, nor see to it that it was actually burned, wholly or partially. The acts which the statute declares shall constitute an express revocation were none of them done. If, in any case, in the absence of any of the acts specified in the statute, the fraud of the devisee could be held to supply the place of such acts, the record before us perhaps presents such a case. But we cannot vary or dispense with the statutory rule, which the legislature has, for wise reasons, established on account of the fraud of an interested party. The statute requires that the will itself should be destroyed, or bear some of the marks of defacement or spoliation, manifesting the intent to revoke. The act and intent must concur, and there must be proof of both, though the intent may be inferred from the facts and circumstances. The law will not permit the formalities of the execution of a will to be dispensed with because of fraudulent interference, and the same rule must be applied in respect to the statutory requisites of revocation: 4 Kent's Com. 520, 521. In *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395, Woodworth, J., says: "There must be a canceling *animo revocandi*. Revocation is an act of the mind, which must be demonstrated by some outward and visible sign of revocation. The statute has prescribed four. If any of them are performed in the slightest manner, joined with a declared intent to revoke, it will be an effectual revocation": *Gains v. Gains*, 2 A. K. Marsh. 190; 12 Am. Dec. 375; *Bibb v. Thomas*, 2 W. Black. 1043; *Doe v. Harris*, 6 Ad. & E. 209; *Jackson v. Betts*, 9 Cow. 208; *Blanchard v. Blanchard*, 32 Vt. 62. But the failure to perform some one of the acts designated by the statute cannot be excused, though such formal act of revocation be defeated or prevented by fraudulent devices: *Kent v. Mahaffey*, 10 Ohio St. 204; *Hiss v. Fincher*, 10 Ired. 139; 51 Am. Dec. 383; *Malone v. Hobbs*, 1 Rob. (Va.) 346; 39 Am. Dec. 263; *Clingan v. Mitchellree*, 81 Pa. St. 25; *Gains v. Gains*, 2 A. K. Marsh. 190; 12 Am. Dec. 375.

Under the clause saving revocations, "implied by law from subsequent changes in the condition or circumstances of the testator," it is claimed that the conveyance to Mrs. Burch, above referred to, and which was set aside by the court on the ground of undue influence, must be construed as an implied revocation of the will in question. Of course, a sale of the estate devised must operate as a revocation, for the will

cannot thereafter take effect on it; and it is admitted that if the deed had been valid and effectual to convey the premises, it would have worked a revocation; but the respondent insists that the rule is not applicable to a deed adjudged invalid, and not the deed of the grantor, for fraud or undue influence. If, in opposition to the allowance of a will in probate proceedings, a revocation in writing, executed in due form by the testator, had been produced, clearly the proponent would not be concluded from showing that it was not the voluntary act of the testator, but that it was procured by fraudulent devices and undue influence: *O'Neill v. Farr*, 1 Rich. 80. But we can see no distinction in this respect between such an instrument and a deed which is claimed to work a revocation by implication, if the deed was not the act of the testator, and the existence of the deed is due to fraud and undue influence, especially where, as in this instance, the fact is already adjudicated that the instrument, though in form the testator's deed, is no deed. "Whoever orders it to be delivered up declares it to be no deed," says the chancellor in *Hawes v. Wyatt*, 3 Brown Ch. 156. The general rule is, that no revocation can be good which is procured by fraud, or where the testator was unduly influenced to make it: Schouler on Wills, sec. 184. It is true, as Chancellor Kent observes (4 Com. 528), that not only contracts to convey, but inoperative conveyances, will amount to a revocation if there be evidence of an intention to convey. But in such cases, where the title does not in fact pass, the intention must be manifest. Mr. Greenleaf, however, seems to recognize the distinction insisted on by the plaintiff's counsel here (2 Greenl. Ev., sec. 687), for he says: "The rule [i. e., implied revocation] does not apply to a conveyance which is void at law on account of fraud or covin; yet if the deed is valid at law, but impeachable in equity, it will be held in equity as a revocation"; citing *Simpson v. Walker*, 5 Sim. 1. The same distinction is recognized in other English cases, though Lord Thurlow held differently in *Hawes v. Wyatt*, 3 Brown Ch. 156. And Mr. Redfield, in noticing these authorities (1 Redfield on Wills, sec. 844), is of the opinion that if the deed in such cases is void, it should not be allowed an incidental operation by way of revocation. In *Smithwick v. Jordan*, 15 Mass. 113, a case resembling this on the facts, the court held that a deed found to have been obtained by fraud and imposition, after the execution of the will, was no revocation.

In this case the court found that the decedent was old and feeble, in ill health, and addicted to the habitual use of intoxicating liquors, though not of unsound mind, and that the deed was set aside on the ground that the same was procured by reason of undue influence and restraint exercised over said decedent by the said Bridget Burch, at the time of the execution thereof. The instrument was then adjudged not to have been the act and deed of the testator, because procured by her by undue influence and restraint. She had acquired such dominion over his will as to destroy his free agency, and constrain him to do against his free will what he was unable to refuse: 2 Greenl. Ev., sec. 688; *Mitchell v. Mitchell*, 43 Minn. 73. Had he been mentally incapacitated to execute the deed, there would have been no question as to the rule. He was only partially so, but his imbecility rendered him an easy victim to imposition. We think the same rule ought to apply in each case. There must be *animus revocandi*, and we can recognize no distinction, as respects the question of implied revocation, between the effect of a deed which is executed by a person who has no will, and one whose will is directed by another person: *Rich v. Gilkey*, 73 Me. 595, 601.

3. It is further insisted that by reason of the fraud and misconduct of the defendant in preventing the revocation of the will, the court should have adjudged her not entitled to take her distributive share, or that she should be declared a trustee *ex maleficio*, and that it should have been so determined on the appeal in the district court, which, sitting as a court of equity, had full jurisdiction to try and determine the issue. This is an erroneous view of the jurisdiction of the probate court in proceedings for the proof and allowance of a will. The question was considered and determined in *Greenwood v. Murray*, 26 Minn. 259, in which it is held that "the probate court has exclusive jurisdiction, in the first instance, to take proof of wills of real and personal estate. The decree of that court establishing a will is, unless reversed on appeal, conclusive that it was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it. But the probate decides nothing beyond this. The legal effect of the will, or of its various provisions, its construction and operation, do not come in question, and cannot be passed upon, on an application to admit the will to probate. The probate court does not assume to determine the validity of a devise, but only that the instrument presented for

probate was executed as his last will and testament by the testator in the manner prescribed by statute, and that he was legally competent to make a will." Upon appeal from an order of the probate court allowing or refusing the probate of a will, the district court exercises probate jurisdiction to make such determination as the probate court ought to have made (*Berksey v. Judd*, 31 Minn. 271), but no other or greater. It can exercise no original jurisdiction in the premises, and cannot assume, on such appeal, to declare a trust under the will, or to determine the ultimate rights and interests of parties in the estate. The court below, therefore, declined to pass upon the question suggested, and it is not properly before us for our consideration.

Judgment affirmed.

#### The Revocation of Wills.\*

*Classification of the Modes of.* — The subject of the revocation of wills has long been governed by statutes both in this country and in England, and no action or inaction can be successfully urged as a revocation, unless it is such as is recognized and conceded to have that effect by statute. But for the statutes upon the subject, the revocation of a will might doubtless be manifested by any word or act from which the inference might fairly be drawn that the testator no longer desired that the instrument executed as and for his will should have that effect: *Cranwell v. Sanders*, Cro. Jac. 497. Under the statutes, a will may be revoked from certain changes in the testator's circumstances from which the law infers that he must have intended a change, either total or partial, in the disposition of his property, and revocations of this class may well be termed implied revocations. All other revocations must be manifested by some act of the testator, done for the sole purpose of destroying the effect of his pre-existing will in whole or in part, or by creating some other instrument by which his property, upon the event of his death, will be disposed of in a manner wholly or partly different from the disposition previously made by him; and revocations of this class, for want of any better term, we shall call express revocations.

An express revocation can never be accomplished by words without acts, though it may result from acts without words: *Reed v. Harris*, 2 Nev. & P. 615; 8 Ad. & E. 1; W. W. & D. 684; and the acts which will be permitted to have this effect must be those designated in the statute. None other will be permitted to operate, no matter how clearly appears the purpose of the testator to destroy his will, and his belief that such purpose has been accomplished: *Slaughter v. Stephens*, 31 Ala. 418; *Blakemore's Succession*, 43 La.

#### \* REFERENCE TO MONOGRAPHIC NOTES.

- Implied revocation of wills: 15 Am. Dec. 659-661.  
 Revocation of wills: 12 Am. Dec. 377-380.  
 Revocation of wills implied from marriage and birth of issue: 55 Am. Dec. 516-518.  
 Revivor of first will by the revocation of second: 76 Am. Dec. 652-656; 45 Am. Rep. 327-344.  
 Lost wills, probate of: 84 Am. Dec. 626-631.  
 Legacies, ademption of: 37 Am. Dec. 667-671.  
 Lapse of legacies and devises: 94 Am. Dec. 156-160.

Ann. 845. The statutes designating the acts which constitute a revocation of a will vary perhaps less than those upon any other topic which has been so frequently the subject of statutory regulation. Generally, and we think universally, they permit a revocation to be effected by any subsequent writing executed and attested in the same manner as the will revoked: *Baker v. Story*, 23 Week. Rep. 147; 31 L. T., N. S. 631; Stats. 1 Will. IV., and 1 Vict., c. 26, sec. 20; *Floyd v. Floyd*, 3 Strob. L. 44; 49 Am. Dec. 626; Stimson's American Statutes, sec. 2673; and in some instances the omission of some of the formalities of execution or attestation is permitted. All other revocatory acts must produce some physical effect upon the will to be revoked, and, failing in this, the purpose of the testator is not realized and the will must stand, though it is clear that he undertook to revoke it, and believed that his undertaking had been successful. The will must be either wholly or partly destroyed, torn, mutilated, or obliterated by the testator with the intent to revoke it: Stimson's American Statutes, sec. 2672; 7 Will. IV., 1 Vict., c. 26, sec. 20; *Hise v. Fincher*, 10 Ired. 139; 51 Am. Dec. 383; *Wikoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597.

*Revocatory Intent, Necessity of.* — To an express revocation of a will a union of act and intent is essential. Either is ineffective in the absence of the other. How far a revocatory act must be pursued before it can become effective we shall consider hereafter, and for the present shall confine our attention to the consideration of revocatory acts which must be denied operation because not accompanied by any revocatory intention. This intention cannot exist, in contemplation of law, in the absence of testamentary capacity on the part of the testator at the moment when he does the revocatory act: *Forman's Will*, 54 Barb. 274; and though his want of such capacity is but temporary, as where he tears his will into fragments while suffering from an attack of *delirium tremens*, but upon recovering and being informed of what he had done, declares that he must have been mad, and that he will make a fresh will, but dies without making it, the original will is not revoked: *Brunt v. Brunt*, L. R. 3 P. D. 37; 28 L. T., N. S., 368; 21 Week. Rep. 392. If a will has been mutilated or destroyed, it is always competent to prove that the act was not that of the testator, and this may be either by showing that it was done by another without his direction: *Collagan v. Burns*, 57 Me. 449; or if by the testator, that it was done by him without any revocatory intent: *Burtenshaw v. Gilbert*, Cowp. 49. If it clearly appears that the destruction of a will was not done by the testator, nor by his consent or authority, it is not revoked though such destruction took place in his presence, and he, being pressed to execute another will, said that he could not bring his mind to it, and that it must remain as it was: *Mills v. Milward*, L. R. 15 P. D. 20.

There have been several instances in which a will has been destroyed or mutilated by the testator, intentionally and with the purpose of revoking it, in which its revocation has been held not to have been accomplished, because it was clearly proved that some further act was intended to be done by him before the revocation should take effect: *Gardiner v. Gardiner*, 65 N. H. 230. Thus if it is shown that the testator did not intend to die intestate, but merely wished to substitute one will for another, or to perfect a will already executed, his destruction of it does not necessarily revoke it, as where he copies it with a view of correcting the spelling, and with the intention of re-executing it as copied, but fails to carry out such intention: *Wilbourn v. Shell*, 59 Miss. 206; 42 Am. Rep. 363. So where he believes that he has executed a second will, and on that account destroys his first, but the second will cannot take effect because not properly executed: *Williams v. Tyley*,



John. 530; *Clarkson v. Clarkson*, 2 Swab. & T. 497; 31 L. J. P. D. 143; 10 Week. Rep. 731; 6 L. T., N. S., 506. The tearing to pieces of his will by a testator on being told by a friend that it was invalid, together with instructions by the testator to his wife to put the will in the fire, does not revoke it, if he afterwards, thinking that his informant might be in error, rescues the pieces before they are to any extent burnt, and preserves them: *Giles v. Warren*, 41 L. J. P. D. 59; L. R. 2 P. & D. 401; 20 Week. Rep. 827; 26 L. T., N. S., 780. If the destruction is not done with intention to execute another will to take the place of that destroyed, but under a mistake of law or of fact, either as to its effect upon a prior will or as to the claims or necessities of some of the legatees, it will, nevertheless, operate as a revocation, as where a will was destroyed in the mistaken belief that it would revive an earlier will: *Dickinson v. Swatman*, 6 Jur., N. S., 831; 30 L. J. P. D. 84; 4 Swab. & T. 205. If a will is revoked by another writing, and it appears therefrom that such revocation was caused by a mistake of fact induced by the testator's believing the representations of a third person, then the revocation is generally regarded as conditional, and as dependent upon the fact being as represented, and is not permitted to operate when it is established that the information upon which the testator acted was incorrect: *Mendinhall's Appeal*, 124 Pa. St. 387; 10 Am. St. Rep. 590; *Campbell v. French*, 3 Ves. 221; *Doe v. Evans*, 10 Ad. & E. 228. But though it appears from the instrument of revocation that the testator revoked it because of his belief in the existence of a certain fact, still the revocation must be permitted to operate, though the fact is not as assumed by him, if it was one upon which he must have acted from his own knowledge or impressions, and with respect to which his action was not founded upon representations made to him by third persons: *Hayes v. Hayes*, 21 N. J. Eq. 265; *Mendinhall's Appeal*, 124 Pa. St. 387; 10 Am. St. Rep. 590; *Dunham v. Averill*, 45 Conn. 61; 29 Am. Rep. 642; *Gifford v. Dyer*, 2 R. L. 99; 57 Am. Dec. 708.

*Revocation by Agents.* — The revocation of a will must be the personal act of the testator. He cannot delegate to an agent authority to do the act for him: *Stockwell v. Ritherdon*, 12 Jur. 779; *In re North*, 6 Jur. 564. Another person, however, may be selected as the mere instrument of the testator, and required to do the revocatory acts in his presence, in which event any act so done in the presence and by the direction of the testator is his personal act, and operates to the same extent as if done by his own hands: *Stimson's American Statutes*, sec. 2672; though in some of the states, even in these circumstances, the assent of the testator is required to be proved by two witnesses: *Stimson's American Statutes*, sec. 2672. Where a statute permits the revocation of a will to be evidenced by a writing signed by the testator and attested in the manner designated therein, a direction by the testator to another person to destroy a will may of itself take effect as a revocation when it is executed and attested in the manner prescribed by the statute: *Walcott v. Ochterlony*, 1 Curt. Ecc. 180; *In Goods of Durance*, 41 L. J. P. D. 60; L. R. 2 P. & D. 406; 20 Week. Rep. 759; 26 L. T., N. S., 983.

*The Destruction of a Will* is one of the modes of revoking it recognized by all the statutes upon the subject, but it is always essential that the destruction be accompanied with the intent to thereby revoke the will: *White v. Oasten*, 1 Jones, 197; 59 Am. Dec. 585. We have heretofore stated that the express revocation of a will can be accomplished only by a union of revocatory act and intent. An unexecuted intention cannot destroy a pre-existing will: *Brown v. Thorndike*, 15 Pick. 388; *Semmes v. Semmes*, 7 Har. & J. 388; *Ray v. Walton*, 2 A. K. Marsh. 71; *Gains v. Gains*, 2 A. K. Marsh.

190; 12 Am. Dec. 375; *Greer v. McCrackin*, Peck, 301; 14 Am. Dec. 755; *Malone v. Hobbs*, 1 Rob. 346; 39 Am. Dec. 263; *Yates v. Cole*, 1 Jones Eq. 110; 59 Am. Dec. 602. There may be some question of the applicability of this rule when the testator has undertaken to perform the requisite revocatory act and believes he has done it, and his performance is prevented by some deceit or other fraud of a third person interested in the will. Thus in Georgia the court appears to have been of the opinion that a testator unable to see, who was handed an old letter when he called for his will, and thereupon destroyed the letter in the belief that he was destroying the will and with intent to revoke, that its revocation was thereby effected: *Pryor v. Coggins*, 17 Ga. 444. The better opinion is, however, that unless the act of intended destruction leaves some visible effect upon the will, such as tearing, partially burning, or otherwise obliterating it, it is not revoked, though the testator intended to destroy it, and is assured and believes that his intention has been accomplished: *Malone v. Hobbs*, 1 Rob. 346; 39 Am. Dec. 263; *Hiss v. Fincher*, 10 Ired. 139; 51 Am. Dec. 333; *Boyd v. Cook*, 3 Leigh, 32; *Kent v. Mahaffey*, 10 Ohio St. 204; *Clingan v. Mitchellree*, 31 Pa. St. 33; *Bibb v. Thomas*, 2 W. Black. 1043; *Reed v. Harris*, 6 Ad. & E. 209, 218; *Ohees v. Lovejoy*, *In re Harris*, L. R. 2 P. D. 251; 46 L. J. P. D. 66; 25 Week. Rep. 853; 37 L. T., N. S., 294, C. A.; and the principal case. There have been decisions suggesting that where the revocation of a will has been prevented by the concealment or other fraud of a beneficiary therein named, he may, by a suit in equity, be charged as trustee of the persons shown to have been prejudiced by such fraud: *Gains v. Gains*, 2 A. K. Marsh. 190; 12 Am. Dec. 375. But we apprehend that these suggestions are erroneous, and that a practical revocation in a mode forbidden by statute cannot thus be brought about by resorting to equity, and that unless the revocatory acts have been to some extent performed, the will must be respected, and enforced in equity as well as at law: *Kent v. Mahaffey*, 10 Ohio St. 204.

*Destruction, Presumption of, from Will not being Found.*—In a great majority of the instances in which wills are destroyed for the purpose of revoking them, there is no witness to the act of destruction, and all evidence of it perishes with the testator. The law does not require any evidence of such destruction to be preserved, and the fact that it has taken place must either remain unproved or be inferred from evidence showing that after due search the will cannot be found. No doubt if a will is shown to have been in the the custody of the testator, or that he had access to it, and it cannot be found after his death, the presumption arises that he destroyed it with intent to revoke it: Note to *Tynan v. Paschal*, 84 Am. Dec. 629; *Snider v. Burks*, 84 Ala. 53; *Behrens v. Behrens*, 47 Ohio St. 323; 21 Am. St. Rep. 820; *Betts v. Jackson*, 6 Wend. 181; *Podmore v. Wharton*, 3 Swab. & T. 449; 10 L. T., N. S., 754; 33 L. J. P. D. 143; 13 Week. Rep. 106; *In Goods of Mitchenon*, 9 Jur., N. S., 360; 32 L. J. P. D. 202; *In Goods of Brown*, 1 Swab. & T. 32; 4 Jur., N. S., 244; 27 L. J. P. D. 20; *Foster's Appeal*, 87 Pa. St. 67; 30 Am. Rep. 340; and this presumption must prevail unless it is overcome by competent evidence sufficient to satisfy the jury that the testator did not destroy it: *Welsh v. Phillips*, 1 Moore P. C. C. 299. This presumption is never conclusive: *Scoggins v. Turner*, 98 N. C. 135. It is sometimes said that the evidence to overcome it must be clear and satisfactory: *Eckersley v. Platt*, L. R. 1 P. & D. 281; but we apprehend that all that can be safely said upon this subject is, that the evidence must be competent, and must satisfy the jury or tribunal by which the question is to be decided that the testator did not destroy nor revoke his will: *Kitchens v. Kitchens*, 39 Ga. 168; 99 Am. Dec. 453; *Schultz v. Schultz*, 35

N Y. 653; 91 Am. Dec. 83; *Dawson v. Smith*, 3 Houst. 335. Declarations of a testator may be received in evidence on behalf of either party, and are admissible when they tend either to show that he, up to a time shortly before his death, relied upon the will and spoke of it as existing and in force: *Matter of Page*, 118 Ill. 576; 59 Am. Rep. 395; *Bekrens v. Bekrens*, 47 Ohio St. 323; 21 Am. St. Rep. 820; *Whiteley v. King*, 17 Com. B., N. S., 756; 10 Jur., N. S., 1079; 13 Week. Rep. 83; 11 L. T., N. S., 342; or, on the other hand, that he asserted in his lifetime that he had destroyed it: *Keen v. Keen*, L. R. 3 P. & D. 105; 29 L. T., N. S., 247; 42 L. J. P. & D. 61. It is no objection to the evidence offered to rebut the presumption of revocation arising from a will not being found that such evidence is parol: *Sugden v. St. Leonards*, 34 L. T., N. S., 572; L. R. 1 P. & D. 154; 45 L. J. P. & D. 49; 24 Week. Rep. 479, C. A. Evidence of unchanged affection and intention on the part of a testator towards the beneficiaries of his will is admissible and entitled to great weight: *Patten v. Poulton*, 1 Swab. & T. 55; 4 Jur., N. S., 341; 27 L. J. P. & D. 41. There may, perhaps, be instances in which the presumption of revocation may be rebutted by evidence showing that other persons as well as the testator had access to his will, and were interested in destroying it, and might have destroyed it after his death. We apprehend that evidence of this character can never be sufficient unless supported by other evidence tending to implicate persons thus placed under suspicion, as where such persons bring forward a document which they falsely claim to be the will of the testator, and in which provisions are made in their favor: *Battyll v. Lyles*, 4 Jur., N. S., 718. Generally, however, those who seek to procure the admission to probate of a will that cannot be found must not only assume the burden of proving that it was not destroyed by the testator, but must offer evidence which goes beyond creating a mere suspicion that it might have been destroyed by some third person or showing that such third person was prejudicially affected by it, and had opportunities for destroying it: *Collyer v. Collyer*, 110 N. Y. 481; 6 Am. St. Rep. 405; *Bauskett v. Keitt*, 22 S. C. 187. If a testator soon after executing his will became insane, and so continued until his death, its revocation will not be presumed from its loss, and the contestants must assume the burden of proving that it was destroyed by the testator while of sound mind: *Sprigge v. Sprigge*, L. R. 1 P. & D. 608; 38 L. J. P. D. 4; 17 Week. Rep. 8; 19 L. T., N. S., 462.

*The Burning of a Will*, if complete and accompanied with a revocatory intent, is one of the most efficient modes of destruction, and is therefore sufficient as a revocatory act (*Banks v. Banks*, 65 Mo. 432), whether specially mentioned in the statute or not; but the burning may be incomplete without the testator's ever having changed his intention to destroy and thereby to revoke his will. If, when he throws it on the fire, or in a grate where he expects a fire will soon be lighted, it is rescued without his assent or knowledge, and before any part of it is burned or charred, it is not revoked: *Reed v. Harris*, 1 Nev. & P. 405; 6 Ad. & E. 209; W. W. & D. 106; and the principal case. On the other hand, if the purpose to burn is accomplished, however slightly, the revocation is complete, and cannot be avoided by the act of a third person, who secretly, and without the knowledge of the testator, rescued and preserved the will, partially burned but still legible: *White v. Casten*, 1 Jones, 197; 59 Am. Dec. 585; *Johnson v. Brailsford*, 2 Nott & McC. 272; 10 Am. Dec. 601.

*Tearing a Will* is recognized as a revocatory act in all the statutes, provided it is done with intent to revoke: *Pringle v. McPherson*, 2 Brev. 279; 3 Am. Dec. 713; *Bibb v. Thomas*, 2 W. Black. 1043; *Hyde v. Hyde*, 1 Eq. Cas.

**Abr. 408, 409.** Of course any tearing which is not the act of the testator, done with revocatory intent, cannot be successfully relied upon as a revocation, whether such tearing was intentionally done by a third person or is the result of an accident: *Bigge v. Bigge*, 9 Jur. 192; 3 Notes of Cas. 601; *In re Hannan*, 14 Jur. 558; *Clarke v. Scripps*, 16 Jur. 783; 2 Rob. 563. Tearing, in contemplation of law, includes cutting: *Hobbs v. Knight*, 1 Curt. Ecs. 768; *In re Cooke*, 5 Notes of Cas. 399; *Clarke v. Scripps*, 16 Jur. 783; 2 Rob. 563; *In re Beles*, 2 Swab. & T. 600.

A revocation by tearing or cutting may be partial as well as total. Therefore, if any part is torn or cut off or out of a will with revocatory intent, such part is thereby revoked, and the residue may be admitted to probate as if the parts revoked had never been included in the will: *In re Cooke*, 5 Notes of Cas. 390; *In re Lambert*, 1 Notes of Cas. 131; *In Goods of Woodward*, L. R. 2 P. & D. 206; 40 L. J. P. & D. 17; 24 L. T., N. S., 40; 19 Week. Rep. 443. It does not appear to make any difference what part of a will is cut off or torn, provided the intent to revoke it exists: *Bibb dem. Mole v. Thomas*, 2 W. Black. 1043; *Williams v. Tyley*, 5 Jur., N. S., 35; *John. 530*; though there are, doubtless, parts of a will the cutting or tearing of which may more certainly indicate an intention to revoke it than if such cutting or tearing were in some other part. The revocation of a will should be inferred, in the absence of any explanation, from cutting or tearing therefrom the signature of the testator: *Youse v. Forman*, 5 Bush. 337; *In Goods of Harris*, 10 Jur., N. S., 684; 3 Swab. & T. 485; 33 L. J. P. D. 181; 11 L. T., N. S., 276; or of the attesting witnesses: *In Goods of Dallow*, 31 L. J. P. D. 128; *Abraham v. Joseph*, 5 Jur., N. S., 179; or from tearing off the seal, and with it part of a word, though the seal was not an essential part of the will: *Price v. Powell*, 3 Hurl. & N. 341; 27 L. J. Ex. 609; or cutting the will into two pieces immediately above the signature of the testator and of the attesting witnesses: *In Goods of Simpson*, 5 Jur., N. S., 1366.

The tearing of a will is a somewhat equivocal act, and therefore does not conclusively establish an intent to revoke it, and in support of the will, evidence is admissible to prove that the tearing was not the act of the testator, or even when it is conceded to have been his act, and to have been commenced with intention to revoke the will, yet that he paused in his purpose, and concluded before he had fully completed his act of destruction to permit the will to stand, as where, in consequence of the protestations of a person present, the testator, after tearing his will nearly through, stops: *Elms v. Elms*, 4 Jur., N. S., 765; 1 Swab. & T. 155; or, having torn it into several pieces, he apparently yields to such protestations, and subsequently putting the separate pieces together, expresses his satisfaction that no material part of the writing has been injured: *Perkes v. Perkes*, 3 Barn. & Ald. 489. It has been held that if a will, though found in a tin box belonging to the testator, has its seal torn off and his name and the names of the attesting witnesses obliterated, a presumption of its revocation arises which cannot be overcome by proving a conversation between the executor and the testator shortly before the death of the latter, with respect to fulfilling a bequest made in the will: *In re White*, 25 N. J. Eq. 501. Where a will was found with the signature of the testator cut off, but gummed in its original place, it was held that the presumption of revocation arising from such cutting was not rebutted, and that if the revocation had been completed by cutting out the signature, it could not be annulled, and the will revived by gumming the signature in its original place: *Bell v. Fothergill*, L. R. 2 P. & D. 148; 18 Week. Rep. 1040; 23 L. T., N. S., 323.

*Cancelling, Obliterating, and Mutilating* are generally specified in the statutes as acts by either of which the intention of the testator to revoke his will may be evidenced. It is difficult to tell what distinction, if any, there is between obliteration, mutilation, and cancellation. Every obliteration must result in a mutilation, and when effectual as a revocation, amounts, in legal effect at least, to a cancellation. In some of the states, their statutes upon this subject have been construed as requiring a revocation by obliteration, mutilation, or cancellation to be of the whole will, and therefore their courts disregard erasures or other obliterations intended to effect only some part or clause of a will: *Law v. Law*, 83 Ala. 432; *Lovell v. Quilman*, 88 N. Y. 37; 42 Am. Rep. 254; *Malone v. Hobbs*, 1 Rob. (Va.) 346; 39 Am. Dec. 263. But except where statutes are in force to which this construction has been or must be given, the obliteration or mutilation of a will may be partial as well as total, and where any clause is by any means so obliterated that it can no longer be read, it is revoked, and the will must be admitted to probate without it: *Swinton v. Bailey*, L. R. 4 App. Cas. 70; 48 L. J. Ch. Div. 57; 39 L. T., N. S., 581; 27 Week. Rep. 293; *Sutton v. Sutton*, Cowp. 812; *In re Hall*, L. R. 2 Pro. & D. 256; *Neale v. Pickard*, 2 Notes of Cas. 406; *Calamy v. Hyde*, 1 Lee Eoc. 423, note; *Matter of Kirkpatrick*, 22 N. J. Eq. 463; *Goods of King*, 23 Week. Rep. 552; *In re Hosford*, L. R. 3 Pro. & D. 211; *Quinn v. Quinn*, 1 Thomp. & C. 437; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *In Goods of Treeby*, L. R. 3 P. & D. 242; *Larkins v. Larkins*, 3 Bos. & P. 16; *Short v. Smith*, 4 East, 419; *In re James*, 1 Swab. & T. 238; *Mercer's Succession*, 28 La. Ann. 564; *Wickoff's Appeal*, 15 Pa. St. 281; 53 Am. Dec. 597; *In Goods of James*, 7 Jur., N. S., 52; *Bigelow v. Gilloft*, 123 Mass. 102; 25 Am. Rep. 32. An incomplete obliteration is, in some of the states at least, operative as a mutilation, and the drawing of lines or the making of erasures with a revocatory intent through the parts erased or over which lines are drawn, though the signature remains legible, constitutes a revocation by mutilation: *Woodfill v. Patton*, 76 Ind. 575; 40 Am. Rep. 269; *Linnard's Appeal*, 93 Pa. St. 313; 39 Am. Rep. 753; *Bigelow v. Gilloft*, 123 Mass. 102; 25 Am. Rep. 32. Generally, however, the drawing of lines through a word or clause in a will with a pencil is regarded as merely indicating an intention to do some act in the future, and is disregarded: *Francis v. Grover*, 5 Haro, 39; *Mence v. Mence*, 18 Ves. 348; *Stover v. Kendall*, 1 Cold. 557; but in Indiana and Pennsylvania the rule is otherwise, and the drawing of lines in pencil is given the same effect as if they were drawn with ink: *Woodfill v. Patton*, 76 Ind. 575; 40 Am. Rep. 269; *Tomlinson's Estate*, 133 Pa. St. 245; 19 Am. St. Rep. 637. The effect of an interlineation or erasure as a revocation or alteration of a will, or of some part thereof, may be averted by statutes prohibiting such revocation or alteration except by a writing signed and attested in the mode designated in such statutes, in which event all of the will, or at least all of it which remains legible, must be admitted to probate: *Soar v. Dolman*, 3 Curt. 121; *Brooke v. Kent*, 3 Moore P. C. O. 334; 1 Jarman on Wills, 133, and cases cited; *The Goods of Parr*, 6 Jur., N. S., 56; *Will of Penniman*, 20 Minn. 245; 18 Am. Rep. 368; *Gay v. Gay*, 60 Iowa, 415; 46 Am. Rep. 78. Strictly speaking, the canceling of a will is the drawing of lines across it in the form of lattice-work, and this, when done with a revocatory intent, consummates the revocation, but as this is only a mode of expressing the testator's intention of annulling his will, it has been insisted that words employed by him clearly manifesting the same purpose ought to be conceded a like effect, as where he wrote on his will, "This will is hereby canceled and annulled in full": *Warner v. Warner's Estate*, 37 Vt. 365. If, however, the cancellation

can be accomplished by words alone, though written and signed by the testator, it is clear, we think, that such cancellation is by writing subsequent to the will, and must be signed and attested as the statute demands every revocatory writing shall be, and therefore, that in those states whose statutes require the revocation of a will by a subsequent writing to be executed and attested in the manner designated, no words of the testator expressing his purpose to cancel or annul his will can be permitted to have that effect, unless accompanied by the designated mode of execution and attestation: *Will of Lard*, 60 Wis. 187; 50 Am. Rep. 355; *Lewis v. Lewis*, 2 Watts & S. 455; *In Goods of Fraser*, L. R. 2 P. D. 40; 39 L. J. P. D. 20; 18 Week. Rep. 263; 21 L. T., N. S., 630.

*Presumptions Arising from Mutilation.* — The tearing, obliterating, or mutilating of a will, or some portion thereof, may, of course, be done after as well as before the testator's death, and by another person as well as by him, and the danger always exists that it may have been done by some other person, if any one besides the testator had access to the will and an opportunity to obliterate or mutilate it. But after the death of the testator there is rarely any evidence accessible to show when or how the will came to be in the condition in which it was found, and the law must therefore indulge the presumption that such evidence of mutilation or obliteration as it bears resulted from the testator's act done with revocatory intent, or it must deny all effect of such evidence, except when it is aided and supplemented by other means of proof. In this dilemma, the courts have adopted the rule that when a will was in the custody of the decedent, and is found after his death bearing upon it evidence of such acts of mutilation or of obliteration as are requisite and sufficient to revoke it, its condition will be presumed to have been the work of the testator, done with intent to effect its revocation. This presumption must prevail, unless overcome by satisfactory and competent evidence: *In Goods of Dallow*, 31 L. J. P. & D. 128; *Elms v. Elms*, 1 Swab. & T. 155; 4 Jur., N. S., 765; 27 L. J. P. & D. 96; *Wolf v. Bollinger*, 62 Ill. 368; *Succession of Muh*, 35 La. Ann. 394; 43 Am. Rep. 242. All erasures, alterations, interlineations, and mutilations are presumed, until explained, to have been made after the will was executed: *Hare v. Nasmyth*, 3 Hagg. Ecc. 192, note; *In re Lewis*, 1 Swab. & T. 31; *Battyl v. Lyles*, 4 Jur., N. S., 718; *Wynn v. Heveningham*, 1 Coll. C.C. 638, 639; *Christmas v. Whynates*, 3 Swab. & T. 81; 9 Jur., N. S., 285; 32 L. J. P. D. 73; 11 Week. Rep. 371; 8 L. T., N. S., 801; *Simmons v. Rudall*, 1 Sim., N. S., 115; *Doe dem. Shallcross v. Palmer*, 16 Q. B. 747; 6 Eng. L. & Eq. 155; *In re White*, 6 Jur., N. S., 808; *Williams v. Ashton*, 1 Johns. & H. 115; *Banks v. Thornton*, 11 Hare, 180; *Cooper v. Bockett*, 4 Moore P. C. C. 419. Where a will was written upon several sheets of paper, each of which was signed by the testator, but after his death only the middle sheet could be found, it was presumed that the will had been mutilated with revocatory intent: *Elms v. Elms*, 1 Swab. & T. 155; 4 Jur., N. S., 765; 27 L. J. P. D. 96; and the like presumption was permitted to prevail when it appeared that the testator took possession of his will on the day prior to his death, and it was found in his bed after such death, with the signature and one corner torn off: *In Goods of Lewis*, 1 Swab. & T. 31; 4 Jur., N. S., 243; 27 L. J. P. D. 31. If the will is shown to have been in the custody of a third person (*Bennett v. Sherrod*, 3 Ired. 303; 40 Am. Dec. 410), or to have been in the custody of the testator, who had been insane for some time prior to his death, the presumption of the revocation does not prevail, and the will must be admitted to probate, unless there is testimony tending to show that its mutila-

tion was the act of the testator, done with intent to revoke it, and while of sound mind: *Harris v. Berrall*, 1 Swab. & T. 153.

The effect of a mutilation or obliteration may always be annulled by proving either that it was not the act of the testator, or, if his act, that it was not the complete and final act by means of which he intended to consummate the revocation of his will. Hence, for the purpose of sustaining the will, it is competent to prove that the testator, though he erased his signature, did so on account of his doubt as to whether it had been signed in a proper manner, and that he thereupon signed his name in full in the presence of other witnesses: *Frear v. Williams*, 7 Baxt. 550; or that he, after writing on the will the word "canceled," further wrote that he intended to make another will, "whereupon I shall destroy this," thereby indicating that his revocation was dependent on the making of another will: *In re Brewster*, 6 Jur., N. S., 56; 29 L. J. P. & D. 69. But if a will is interlined and erased with the avowed purpose of revoking it, and is then handed as a memorandum to a draughtsman from which to draw another will, it is revoked; for an unexecuted purpose to make another will does not suspend the force of a revocation, unless it appears that such revocation was intended to be conditional, and to take effect only after the execution of another will; *Bokanson v. Walcott*, 1 How. 336; 29 Am. Dec. 631.

*Revocation by Subsequent Writing.* — In some of the states a will may be revoked by a subsequent writing declarative of the testator's intention, executed and attested as required by statute, and such writing is effective to accomplish his purpose without being admitted to probate as a will: *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238. This mode of revocation, even where authorized, is rarely resorted to, preference being given, if the testator's intent to revoke is exercised in writing at all, to some writing testamentary in character and for the operation of which its admission to probate is necessary. The revocation of one will by another may be express or implied, total or partial. It is express when a later will declares that a pre-existing, or that all pre-existing, wills are revoked. There is no doubt that such a declaration is not indispensable to the revocation: *Clarke v. Ransom*, 50 Cal. 595. Preference will always be accorded to the last will, and so far as its bequests, devises, and directions cannot be satisfied and followed without disregarding some devise, bequest, or direction of a former will, a revocation necessarily results. Thus, if the same estate is given to different persons by wills of different dates, the later will revokes the earlier: *Evans v. Evans*, 17 Sim. 107. A will disposing of all the testator's property revokes a prior will disposing of a part only: *Moorhouse v. Lord*, 9 Jur., N. S., 677; 32 L. J. Ch. 295; 11 Week. Rep. 637; 8 L. T., N. S., 212; 10 H. L. Cas. 272. And generally, it may be said that a second will, though it contains no clause of revocation, must operate as a revocation of the first, either total or partial, when they are irreconcilable, either wholly or in some respects, and cannot both be given effect at the same time, as where both purport to dispose of all the testator's property, or one of them gives some part of it to one person, and the other to a different person: *In re Fisher*, 4 Wis. 254; 65 Am. Dec. 309; *Reese v. Probate Court of Newyort*, 9 R. I. 434; *Bobb's Succession*, 42 La. Ann. 40; *Webb v. Carpenter*, 16 R. I. 68; but even when two wills do not completely cover the same subject, if, from the second will, taken as a whole, and the circumstances attending its execution, there appears an intention of the testator to dispose of his property in a manner different from that in the first will, it is to that extent revoked: *Dempsey v. Lawson*, 46 L. J. P. D. 23; L. R. 3 P. D. 153; 22 Week. Rep. 353; 30 L. T., N. S., 74. On the other hand, unless the in-

tention of the testator to revoke is clearly manifested, both wills must stand, except where they necessarily conflict: *Cott v. Gilbert*, 9 Moore P. O. C. 181; *Freeman v. Freeman*, 5 De Gex, M. & G. 704. The expression in a later will, "This is my last will," is not entitled to any weight: *Leslie v. Leslie*, 6 Ir. R. Eq. 332; it amounts to no more than a statement of a fact which is apparent from a mere inspection of the two wills if they are truly dated, and which, whether they are so dated or not, may be proved by any competent evidence. Therefore, where a testator leaves two or more wills, each of which may be given some effect without denying effect to all the provisions of the others, all are entitled to admission to probate, as together constituting the last will of the decedent: *Lemage v. Goodban*, L. R. 1 P. & D. 57; 12 Jur., N. S., 32; 35 L. J. P. D. 28; 13 L. T., N. S., 508; *Geaves v. Price*, 32 L. J. P. D. 113; 11 Week. Rep. 809; *O'Leary v. Douglass*, 1 Ir. L. R. Ch. Div. 45; *In Goods of Petchell*, 43 L. J. P. D. 22; L. R. 3 P. & D. 153; 43 L. J. P. D. 22; 22 Week. Rep. 353; 30 L. T. 74; the later will operating as a revocation *pro tanto* of the earlier, so far as inconsistent therewith: *Nelson v. McGiffert*, 3 Barb. Ch. 158; 49 Am. Dec. 170. Where, however, the last will contains a general clause revoking all prior wills, they are thereby rendered inoperative, though the dispositions of the property made by them are not wholly irreconcilable, and the second will does not purport to dispose of all the testator's property, as where the first will disposes of his property, both real and personal, and the last will, containing the general clause of revocation, disposes of personal property only: *Cottrell v. Cottrell*, 41 L. J. P. D. 57; L. R. 2 P. & D. 397; 20 Week. Rep. 590; 26 L. T., N. S., 527. If the execution of the second will is proved, but its contents cannot be established, the first must be permitted to stand, if for no other reason than that in the absence of evidence it cannot be presumed that the last either contained a clause of revocation or made dispositions of property inconsistent with those of the first will: *Nelson v. McGiffert*, 3 Barb. Ch. 158; 49 Am. Dec. 170. There is another reason which might prevail in some jurisdictions, to wit, that from the loss of the last will its destruction and consequent revocation may be presumed, and the first will be deemed to have been revived thereby; but upon this topic we shall speak hereafter.

*A Codicil and a Will should be Construed Together* as one instrument, except that so far as they conflict, the codicil, being the latest expression of the testator's desires, must be given precedence: *Newcomb v. Webster*, 113 N. Y. 191. Unless a codicil cannot otherwise be conceded its proper effect, it does not operate as a revocation of a will, either total or partial: *Hard v. Ashley*, 117 N. Y. 606; *Rodgers v. Rodgers*, 6 Heisk. 489. Even where it contains a general clause of revocation, such clause may be considered as relating to pre-existing wills, of which the codicil is not a part, and the expression in the codicil, "I hereby revoke and annul all wills by me heretofore made," does not revoke a will to which the codicil is affixed, where the codicil declares that it is to be taken as a part of such will: *Gelbke v. Gelbke*, 88 Ala. 427.

Some difficulty may, at times, be experienced in determining whether a will and codicil are so united that the revocation or destruction of one necessarily revokes the other. This question must, in most cases, be decided by considering the language and apparent purpose of the two writings, though in some instances the fact that they are not united physically, but are written upon separate pieces of paper kept at different places, may be material and even controlling. Thus, where the revocation is by the destruction of the will, it cannot, no matter what was the actual intention of the testator, include a codicil written upon a separate piece of paper, and capable of being



admitted to probate by itself: *Malone v. Hobbs*, 1 Rob. 346; 39 Am. Dec. 263. Generally, when a codicil is of such a character that it may stand independent of the will, the revocation of the will does not affect the codicil, nor can the codicil be revoked except by observing the formalities required for the revocation of testamentary papers: *Tagart v. Squire*, 1 Curt. Eccl. 286; *In goods of Ellice*, 33 L. J. P. D. 27; 12 Week. Rep. 353; *Farrer v. St. Catharine's College*, L. R. 16 Eq. 19; 21 Week. Rep. 38; 27 L. T., N. S., 322; *In Goods of Savage*, L. R. 2 P. & D. 78; 39 L. J. P. & D. 25; 18 Week. Rep. 766; 22 L. T., N. S., 375. Therefore, if a will is lost or destroyed, and the codicil is preserved or found, it is entitled to admission to probate: *Black v. Jobling*, 38 L. J. P. D. 74; L. R. 1 P. & D. 685; 21 L. T., N. S., 298; 17 Week. Rep. 4108; *In Goods of Turner*, L. R. 2 P. D. 403; 21 Week. Rep. 38; 27 L. T., N. S., 322. In other cases, it has been decided that where a will has been destroyed by the testator, the burden of proof is upon those claiming under a codicil to show that he did not intend in destroying the will to also destroy the codicil: *Grimwood v. Coxens*, 2 Swab. & T. 364; 5 Jur., N. S., 497; and that the cutting from a will of the signature of the testator may operate as a revocation of a codicil at the foot of a will, if it is proved that the testator so intended: *In Goods of Bleckley*, L. R. 8 P. D. 169; 52 L. J. P. D. 102; 31 Week. Rep. 171; 47 L. J. P. D. 663. Where the statute authorizes the execution of olographic wills, and an olographic codicil to a will is permissible, whether such will was olographic or not, it may operate as a revocation of a clause in the will with which it is inconsistent: *In re Soher's Estate*, 78 Cal. 477. It is, of course, essential to the operation of a second will as a revocation, whether it contains a clause of revocation or not, that it be valid, or in other words, that it be executed in such form and manner that it can operate as a will: *Hollingshead v. Sturgis*, 21 La. Ann. 450. If it be set aside for undue influence exercised over the testator as to all its devises and bequests, its general clause of revocation is thereby annulled: *Rudy v. Ulrich*, 69 Pa. St. 177; 8 Am. Rep. 238; *Laughton v. Atkins*, 1 Pick. 535.

*Revival of Revoked Will.* — The revocation or attempted revocation of one will by another may be ineffective on account of the later will being for some reason void or incapable of execution, and in some of the states, on account of the testator's destruction or revocation of the revoking will. Because a will does not take effect until the death of the testator, and is before that time entirely inoperative, it has been insisted that a revocation by a second will, whether express or implied, cannot become operative until the will of which it is a part is established and declared operative, and therefore, that when such second will is itself destroyed or otherwise revoked, its revocatory effect dies with it, and, as a necessary consequence, that prior wills, unless destroyed by some revocatory act other than that of making a later will, remain in force and become operative upon the testator's decease: *Goodright v. Glazier*, 4 Burr. 2512; *Harwood v. Goodright*, Cowp. 87, 92; 3 Wils. 497; *Randall v. Beatty*, 31 N. J. Eq. 643; *Taylor v. Taylor*, 2 Nott & McC. 482; *Burtenshaw v. Gilbert*, 1 Cowp. 49; *Plintham v. Bradford*, 10 Pa. St. 82; *Bates v. Holman*, 3 Hen. & M. 503; *Linginfeller v. Linginfeller*, Hardin, 127; *Marsh v. Marsh*, 3 Jones, 77; 64 Am. Dec. 598. On the other hand, it has been argued that the revocation of one will by another, especially when the later contains an express revocation, is complete as soon as the last will is duly executed, and is not dependent upon the continuance in force of such will until the death of the testator, and therefore, that though the last will is revoked, lost, or destroyed, or for some other reason cannot be admitted to probate, yet

its operation as a revocation of pre-existing will remains, and such wills are not revived through its revocation: *James v. Marrin*, 3 Conn. 576.

Statutes have been enacted in England and in many of the United States abolishing the common-law rule that the revocation or destruction of a will revives and leaves in force pre-existing and destroyed wills: Stimson's American Statutes, sec. 2679; Stat. Will. IV., and 1 Vict., c. 26, sec. 22; and under the influence of these statutes, the rule that a will revoked by another will cannot be revived by the revocation of the later has been almost universally adopted: *Scott v. Fink*, 45 Mich. 241; *Wallis v. Wallis*, 114 Mass. 510; *State v. Crossley*, 69 Ind. 203; *Bohanon v. Wolcot*, 1 How. 336; 29 Am. Dec. 631; *Rudisill v. Rodes*, 29 Gratt. 147; *Beaumont v. Keim*, 50 Mo. 28; *Colvin v. Warford*, 20 Md. 357; *Harwell v. Lively*, 30 Ga. 315; 76 Am. Dec. 649; *Pickens v. Davis*, 134 Mass. 252; 45 Am. Rep. 322; *Haibes v. Nicholas*, 72 Tex. 481; *Wood v. Wood*, L. R. 1 P. & D. 309; 15 L. T., N. S., 593; 36 L. J. P. & D. 34; *Donohoo v. Lea*, 1 Swan, 119; 55 Am. Dec. 725. Therefore the probate of a will may be successfully resisted by proving the subsequent execution of another containing either a general clause of revocation or a clause specifically revoking the will offered for probate, and if the existence of the second will and its clause of revocation can be established, it is not material that it has been revoked or cannot be produced, and that no part of its contents can be proved except such clause of revocation: *In re Cunningham*, 38 Minn. 169; 8 Am. St. Rep. 650; *Stevens v. Hope*, 52 Mich. 65; *Wallis v. Wallis*, 114 Mass. 510. The English statute upon this subject declares that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by re-execution, thereof or by a codicil executed in the same manner therein required, and showing an intention to revive the same: Stat. 7 Will. IV., and 1 Vict., c. 26, sec. 22. Under this and similar statutes, it may be that a second will containing no clause of revocation, but inconsistent with the previous will, may operate as a revocation of such previous will, though revoked before the death of the testator. But upon principle, in the absence of any statute necessarily controlling the question, we apprehend that where a revocation of a second will is only such as results from its provisions being inconsistent with those of a former will, then if the second will is revoked or for any reason cannot become operative as a will, no conflict between its provisions and those of a prior will is material, and the prior will must be admitted to probate, and treated in all respects as if the decedent had never made any other will: *Peck's Appeal*, 50 Conn. 562; 47 Am. Rep. 685; though there are cases deciding that where a second will is inoperative because devises or bequests therein made are for some reason void, such will, though ineffectual as a will, nevertheless is operative as a revocation of the previous will with which it is inconsistent: *Carpenter v. Miller*, 3 W. Va. 174; 100 Am. Dec. 744.

*Evidence of Intent to Revive Revoked Will.* — Under statutes similar to the English statute last herein referred to, evidence is not admissible to prove that the testator's intention in revoking one will was to revive another, unless such evidence consisted of some writing conforming to the statute: *Harwell v. Lively*, 30 Ga. 315; 79 Am. Dec. 649; *Major v. Williams*, 3 Curt. Ecn. 432; *Rudisill v. Rodes*, 29 Gratt. 147. Whether or not, in the absence of statutes of this character, evidence may be received to show what was the intention of the testator in revoking his last will is a question upon which the judges have not agreed. The doctrine of the English ecclesiastical courts was, that no presumption existed either against or in favor of the revival of the pre-existing will, and therefore that the intention of the testator should

be ascertained from the existing facts and circumstances: *Ustick v. Bowden*, 2 Add. Eccl. 116. In Maryland, on the other hand, it was decided that the presumption should be indulged that the testator intended to revive his pre-existing will, but that such presumption might be rebutted: *Coleis v. Warford*, 20 Md. 357; and where no statute forbids, we think that the weight of reason and authority permits the reception of evidence tending to show what was the testator's purpose when he revoked his last will, and to permit such revocation to operate as a revival of a former will or not, as appears most likely to carry out his intentions: *Pickens v. Davis*, 134 Mass. 252; 45 Am. Rep. 322; *Williams v. Williams*, 142 Mass. 515.

*Implied Revocations.* — "Revocations at common law were either express or implied; the latter are termed revocations in law, and might be effected in two ways: 1. By a total alteration in the circumstances of the testator; and 2. By an actual or implied alteration in his estate"; *Graves v. Sheldon*, 2 D. Chip. 68; 15 Am. Dec. 653. "In all cases of an implied revocation, whether partial or total, the principle is the same; it is, that since the publication, a fact inconsistent with the legacy or testament, as the case may be, has occurred, and from which, therefore, the law presumes a correspondent change in the mind and will of the testator, from which, as a legal deduction merely, he is considered as having died intestate, to the extent of such presumed change of purpose. The doctrine of implied revocation, although the offspring of arbitrary construction, is well defined by settled rules and principles. And therefore, although it is the presumption of a change in the testator's mind that induces the implication, that presumption is artificial and merely legal; and hence the facts from which it may arise are as well defined as the doctrine of revocation itself has been, by the authorities which have established and recognized it. It is not enough that the testator intended to alter or revoke his will, but some fact must have occurred from which an alteration or revocation will actually result by intendment of law; and, therefore, there may be such a revocation, even contrary to the actual intention of the testator: 3 P. Wms. 371; Tol. 21"; *Sneed v. Ewing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41.

*An Implied Revocation Resulting from a Change in the Testator's Circumstances* may be, — 1. From a change in his property; or 2. From a change in his family, or in the beneficiaries in his will. In the majority of instances in which wills are said to have been revoked by implication, their revocation resulted as a matter of necessity, either because the property devised or bequeathed did not belong to the testator at the time of his death, and therefore could not be affected by his will, or an object of his bounty has died or otherwise become unable to receive the benefit intended to be bestowed. Thus where property specifically devised or bequeathed, or directed to be sold, or to be used for or appropriated to some specific purpose, has been conveyed or transferred, whether by the voluntary act of the testator or not, it is clear that his will cannot operate upon it, no matter what his intention may have been at the time of his decease, and that the will is to that extent revoked: *Cooper's Estate*, 4 Pa. St. 88; 45 Am. Dec. 673; *Hawes v. Humphrey*, 9 Pick. 350; 20 Am. Dec. 481; *Graves v. Sheldon*, 2 D. Chip. 71; 15 Am. Dec. 653; *Coulson v. Holmes*, 5 Saw. 279; while in other respects it remains in force: *Hawes v. Humphrey*, 9 Pick. 350; 20 Am. Dec. 481; *Brush v. Brush*, 11 Ohio, 287; *Carter v. Thomas*, 4 Greenl. 341; *Skerrett v. Burd*, 1 Whart. 246; *McRainsy v. Clark*, Tayl. 278; *McTaggart v. Thompson*, 14 Pa. St. 149; *Floyd v. Floyd*, 7 B. Mon. 290; *Arthur v. Arthur*, 10 Barb. 9; *Bowen v. Johnson*, 6 Ind. 110; *Epps v. Dean*, 28 Ga. 533; *Wells v. Wells*, 35 Miss. 638.

*The More Sale of Property* which has been specifically devised undoubtedly indicates that the testator for some cause has abandoned the purpose expressed in his will, and therefore, in the absence of any statute to the contrary, such sale will be treated as a revocation *pro tanto*, though the testator retained the legal title, if the contract of sale is such that a court of equity will compel the specific performance of, in which event, though the purchase price is partly or wholly unpaid, the devisee has no interest either in the land or in the evidences of debt or securities taken to secure the payment of the purchase-money remaining unpaid: *Donohoe v. Lea*, 1 Swan, 119; 55 Am. Dec. 725; *Walton v. Walton*, 7 Johns. Ch. 258; 11 Am. Dec. 456; *Bennett v. Tankerville*, 19 Ves. 170. Though in the lifetime of the testator the contract of sale is rescinded, and he dies seized of the property free of any obligation to sell or convey, yet the revocation implied from the contract to sell is not thereby annulled: *Walton v. Walton*, 7 Johns. Ch. 258; 11 Am. Dec. 456. It was formerly essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will, and that he should continue so seized without interruption until his decease. If, therefore, the testator, subsequently to his will, by deed aliened the lands which he had disposed of by his will, and afterward acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void: 1 Jarman on Wills, 147. The will was regarded in law in the nature of a conveyance of the land devised. It could operate only upon land in which the testator had an interest at the time of the execution of his will, and consequently after-acquired real estate could not pass by it: *George v. Green*, 13 N. H. 521. When the conveyance, subsequent to the devise, though made for a partial purpose, embraced the entire fee-simple, or the whole estate of freehold was the subject of the devise, the rule under the old law was, that the conveyance, though limited in its purpose, and though it instantly revested the estate in the testator, produced a total revocation of the devise: 1 Jarman on Wills, 148. A conveyance by the deviser, subsequent to the devise (except in mortgage or for the purpose of partition), of the estate devised, removes it from the operation of the will, and of necessity operates as an ademption of the subject of the devise, and in effect as a revocation of the will *pro tanto*. If the alienation is partial, the revocation is partial, and if the alienation is of the entire estate, it is in effect a total revocation of the testamentary disposition of the estate, not because of any infirmity or want of operative force in the will, but by reason of the withdrawal of the entire estate from its operation: *Marston v. Marston*, 17 N. H. 503; 43 Am. Dec. 611. And as formerly no after-acquired real estate could pass by a will, a conveyance of the entire estate was regarded as an absolute revocation of the testamentary disposition of property": *Morey v. Sohler*, 63 N. H. 507; 56 Am. Rep. 538. Therefore where a testator devised a specific tract of his land to A, and the residue thereof to B and C, and thereafter sold the whole of his real estate, and subsequently acquired other parcels of real property, it was held that his will was revoked, and that B and C were not entitled to any of the property acquired after the making of the will: *Bowen v. Johnson*, 6 Ind. 110; 61 Am. Dec. 110.

As a general rule, no mere change in the testator's circumstance not involving a change in his family will operate as a revocation of his will, unless such change is one which makes impossible the carrying out of his intentions as manifested in the will. Therefore the fact that after its execution, his property was very greatly increased or diminished in quantity or value, even when accompanied by the further fact that he became insane, and so con-

tinued many years, does not establish an implied revocation of his will: *Warner v. Beach*, 4 Gray, 162; *Verdier v. Verdier*, 8 Rich. 135; *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530; *Webster v. Webster*, 105 Mass. 538; *Blandin v. Blandin*, 9 Vt. 210; *Wogan v. Small*, 11 Serg. & R. 141. The English statute of wills now in force declares that no will shall be revoked by any presumption of intention arising from an alteration in the testator's circumstances: Stat. 7 Will. IV., and 1 Vict., c. 26, sec. 19. This is substantially the rule in force in a large portion of the United States, either as a result of statutes adopting it, or of decisions in which it has been determined to be the necessary result of statutes in which it was not announced in express terms: *Graves v. Sheldon*, 2 D. Chip. 71; 15 Am. Dec. 653; *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530; *Morey v. Sohler*, 63 N. H. 507; 56 Am. Rep. 538; *Prater v. Whittle*, 16 S. C. 40.

The rules relating to the revocation of wills *pro tanto*, arising from the ademption of legacies, are stated in the note to *Hansbrough v. Hooe*, 37 Am. Dec. 667-671. Ademption is "the extinction or withholding of a legacy in consequence of some act of the testator, which, though not directly a revocation of the bequest, is considered in law as equivalent thereto, or indicative of an intention to revoke: Bouvier's Dict. It is accomplished by an alteration in or a transfer of the thing bequeathed, or by such an advancement to the legatee as the law regards as a satisfaction thereof. Thus if a legacy is specific, its ademption may occur when that which is bequeathed is destroyed or disposed of by the testator, or is so altered that it can no longer be regarded as the article bequeathed; and if it is general, and the legatee is a child of the testator, to whom advancements have been made after the execution of the will, their amount may be regarded as having been paid on account of the legacy, and therefore will be deducted from it: See note to *Hansbrough v. Hooe*, 37 Am. Dec. 667-671.

*Revocation Implied from Marriage of a Woman.* — The implied revocation of wills resulting from a change in the family relations of the testator or testatrix arose from his or her marriage, or the birth of issue to him or her after the execution of the will. By the common law the marriage of a woman after the execution of her will necessarily revoked it, whether she survived her husband or not: *Forse and Henbling's Case*, 30 & 31 Eliz., in Com. Banc; 4 Coke, 60, 61; *Hodsdon v. Lloyd*, 2 Bro. C. C. 534; *Cotter v. Loyer*, 2 P. Wms. 623, 624; *Doe v. Staple*, 2 Term Rep. 685, 696; *Long v. Aldred*, 3 Addis. 48; *In re Carey*, 49 Vt. 236; 24 Am. Rep. 133. In many of the United States, statutes have been adopted upon this subject, and by the majority of them, the marriage of a woman operates as an implied revocation of her pre-existing will, though in some the will is revived if she survives her husband: *Stimson's American Statutes*, sec. 2676; *Blodgett v. Moore*, 141 Mass. 75; note to *Young's Appeal*, 80 Am. Dec. 516; *Swan v. Hammond*, 138 Mass. 45; 52 Am. Rep. 255; *McAnnulty v. McAnnulty*, 120 Ill. 26; 60 Am. Rep. 552. Where a statute declares that a will shall be revoked by her subsequent marriage, it is not revoked by implication by the enactment of a later statute conferring testamentary capacity upon married women: *Brown v. Clark*, 77 N. Y. 369; *Fransen's Will*, 26 Pa. St. 202. By the common law, a married woman had not capacity to make a will disposing of her property, nor could she accomplish this disposition by a will made before her marriage. In many of the states her want of capacity to make wills has been removed by statute, and if her marriage operated to revoke her pre-existing will, she might, by republishing it, or by executing a will of like tenor, avoid the effect of such implied revocation; but in most of the states this removal of her want of capacity

has been determined to be in effect the removal of all the reasons of the common-law rule, and therefore to make the rule itself obsolete, and to leave her antenuptial will in full force: *Noyes v. Southworth*, 55 Mich. 173; 54 Am. Rep. 359; *Fellows v. Allen*, 60 N. H. 439; 49 Am. Rep. 328; *Webb v. Jones*, 36 N. J. Eq. 163; *Morton v. Onion*, 45 Vt. 145; *Will of Ward*, 70 Wis. 251; 5 Am. St. Rep. 174. But where a statute declares that every will made by a man or a woman shall be revoked by his or her subsequent marriage, except when made under a power of appointment, an antenuptial will made by a woman three days before her marriage, with the assent of her intended husband, who by a valid contract relinquished all interest in her estate, and agreed that she might dispose of it by will, her will is not revoked by the marriage: *Stewart v. Mulholland*, 88 Ky. 38; 21 Am. St. Rep. 320; *Osgood v. Bliss*, 141 Mass. 474; 55 Am. Rep. 438.

*The Marriage of a Man* did not by the common law revoke his will, whether such will was executed while he was an unmarried man or during the continuance of a previous marriage: *Christopher v. Christopher*, cited in 4 Burr. 2182; *Dick*. 415; *Doe v. Barford*, 4 Maule & S. 10; *Brush v. Wilkins*, 4 Johns. Ch. 506; *Wheeler v. Wheeler*, 1 R. I. 364; and this is the rule in the United States, unless expressly abrogated by statute: *Bowers v. Bowers*, 53 Ind. 430; *Goodsell's Appeal*, 55 Conn. 171; *Ward's Will*, 70 Wis. 251; 5 Am. St. Rep. 174; *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530; except in Idaho: *Morgan v. Ireland*, 1 Idaho, N. S., 786. By the present English statute of wills, the marriage of a man revokes his will, except when it is made in the exercise of a power of appointment, and a freehold estate thereby appointed would not, in default of such appointment, pass to the testator's heirs: *Marston v. Roe dem. Fox*, 8 Ad. & E. 14; 2 Nev. & P. 504; W. W. & D. 712. In several of the United States, statutes similar in purport have been enacted, whereby the marriage, whether of a man or of a woman, revokes his or her will, unless the will makes provisions in contemplation of the marriage, or otherwise shows that the marriage is not to revoke it: *Corker v. Corker*, 87 Cal. 643; note to *Young's Appeal*, 80 Am. Dec. 517; *McAnnulty v. McAnnulty*, 120 Ill. 26; 60 Am. Rep. 552; *Byrd v. Surles*, 77 N. C. 435; *Gay v. Gay*, 84 Ala. 38; *Fidelity F. I. T. & S. B. Co.'s Appeal*, 121 Pa. St. 1; *Duryea v. Duryea*, 85 Ill. 41. A statute declaring that marriage shall not be deemed to revoke a prior will is not applicable to a will made and a marriage contracted before its enactment: *In re Tuller*, 79 Ill. 99; 22 Am. Rep. 164.

Marriage, even when recognized as an implied revocation of a pre-existing will, cannot operate as such unless the marriage is valid, and in England a marriage contracted in a foreign country, and there valid, but invalid in England, does not revoke a will made in the latter country: *Mette v. Mette*, 1 Swab. & T. 416; 28 L. J. P. D. 117. A will bequeathing property to the testator's reputed wife, his marriage to her being invalid, is revoked by their subsequent lawful marriage: *Warter v. Warter*, L. R. 15 P. D. 152.

*Marriage, and Birth of Issue.* — While the marriage of a man did not alone, by the English law, revoke his pre-existing will, there is no doubt that the marriage, whether of a man or of a woman, if followed by the birth of issue, did revoke his or her will: Note to *Young's Appeal*, 80 Am. Dec. 518; *Doe v. Lancashire*, 5 Term Rep. 49, 59; *Israell v. Rodon*, 2 Moore P. C. C. 51; *Matson v. Magrath*, 1 Rob. 680; *Brush v. Wilkins*, 4 Johns. Ch. 506; *In Goods of Cady-wold*, 1 Swab. & T. 34; 27 L. J. P. D. 36; *Brady v. Cubitt*, Doug. 39; *Kenebel v. Scrafton*, 2 East, 541; *Marston v. Roe dem. Fox*, 8 Ad. & E. 14, 57; *Sneed v. Bwing*, 5 J. J. Marsh. 460; 22 Am. Dec. 41. It is not clear that this concurrence of marriage and birth of issue is essential. If a man makes

his will after his marriage, either while he is wholly childless or while he has one or more children living, and a child is afterwards born to him, and he subsequently dies without expressly revoking his will or making any provision for such child, the courts, particularly those sitting in America, especially where any considerable time elapsed between the making of his will and his death, and a change has taken place in his financial circumstances, have been inclined to presume that he intended either an entire revocation of his will, or such revocation *pro tanto* as permitted the child to take the same share in his estate as if he died intestate: *McOulken v. McKennis*, 26 Iowa, 510; *Negus v. Negus*, 46 Iowa, 487; 26 Am. Rep. 157; *Evans v. Anderson*, 15 Ohio St. 324; *Johnston v. Johnston*, 1 Phill. 447; *Sherry v. Lozier*, 1 Bradf. 437; *Bloomer v. Bloomer*, 2 Bradf. 339; *Sneed v. Ething*, 5 J. J. Marsh. 460; 22 Am. Dec. 41; *Hughes v. Hughes*, 37 Ind. 183; *Fallon v. Chidester*, 46 Iowa, 588; 26 Am. Rep. 164; *Young's Appeal*, 39 Pa. St. 115; 80 Am. Dec. 513; *contra*, *Doe v. Barford*, 4 Maule & S. 10; *McCoy v. McCay*, 1 Murph. 449; *Shepherd v. Shepherd*, 5 Term Rep. 51, note; *Baldwin v. Spriggs*, 65 Md. 373. This question is now, in most of the states of the American Union, settled by statute in substantial accord with the rule towards which we have said the American courts inclined.

When an implied revocation of a will has resulted from the marriage of the testator or testatrix, or from marriage followed by birth of issue, the revocation is as complete as if made by the act of the parties to it rather than by operation of law, and the will cannot, as a general rule, be given life and validity, except by some testamentary writing executed and attested in the manner prescribed by law. The death of the child whose birth occasioned the revocation of the will does not revive it, nor in any respect obliterate the implied revocation: *Wright v. Netherwood*, 2 Salk. 593, note; *Emerson v. Boville*, 1 Phillim. 342; cases cited in 1 Phillim. 343; and it seems to be impossible to revive the will by means of any evidence other than that prescribed by statute, no matter how satisfactorily it may appear from such evidence that the testator intended that the will should operate notwithstanding its implied revocation, and that he died in the belief that it did so operate: *Marston v. Roe dem. Fox*, 8 Ad. & E. 14; *Nutt v. Norton*, 142 Mass. 242; *Deupree v. Deupree*, 45 Ga. 415; compare *Miller v. Phillips*, 9 R. I. 141; *Stewart v. Mulholland*, 88 Ky. 38; 21 Am. St. Rep. 320; *Jones v. Mosley*, 40 Miss. 261; 90 Am. Dec. 327.

*Lapse of Devise or Bequest.* — Heretofore we have spoken of the implied revocation of wills resulting from a change in the thing devised or bequeathed, or in the testator's ownership of it, from which the law infers that with respect to it, he intended his will not to be operative after his death. Instead of a change in the subject-matter of a devise or bequest, there may be a change in the person of the devisee or legatee, or the testator may have been misinformed as to the existence of the object of his bounty at the time the will was executed. If a devisee or legatee was dead at the time he was named as such in the will, or dies subsequently, but in the lifetime of the testator, or becomes from any other cause incompetent to receive the devise or bequest at the time of the testator's decease, then the will may be regarded as revoked with respect to the share of such legatee or devisee, unless the will has contemplated the contingency, and made some provision concerning it, by which the property is given to some other person competent to accept it, or some statute has interposed declaring that such share shall vest in certain heirs or representatives of the deceased legatee or devisee. Upon this subject, see note to *Cureton v. Massey*, 94 Am. Dec. 156-160.

*Wills Executed in Duplicate.* — A will is sometimes executed in duplicate, and the duplicates placed in the custody of different persons, in the hope that if one is lost or not produced after the death of the testator, the other will be forthcoming. Of course the revocation of either is the revocation of both, but there may be difficulty in determining whether, from the loss, mutilation, or destruction of one of the copies, the revocation of the will should be presumed. If one of the copies is retained by the testator and the other is consigned by him to some other custodian, there is no doubt that the cancellation, mutilation, or destruction by the testator of the copy kept in his possession establishes the revocation by him of his will: *Burtenshaw v. Gilbert*, Cowp. 52; *Lofft*, 465; *Onions v. Tyrer*, 2 Vern. 741; *Sir Edward Seymour's Case*, cited in *Burtenshaw v. Gilbert*, Cowp. 49; *Snider v. Burks*, 84 Ala. 53. But if both copies are in his custody, and he has mutilated one, but carefully preserved the other, no presumption arises that he intended to revoke his will: *Roberts v. Round*, 3 Hagg. Ecc. 548. If it is shown that a will was executed in duplicate, and one copy retained by the testator and the other given to his wife, and an application is made for the probate of the will, it will be presumed that the copy offered for probate is the one retained by him, and the fact that the other copy is not accounted for does not create any presumption of its destruction or revocation: *Snider v. Burks*, 84 Ala. 53.

*Evidence.* — From the fact that a will once executed continues in force until revoked in the manner prescribed by law (*Gains v. Gains*, 2 A. K. Marsh. 190; 12 Am. Dec. 315; *Card v. Grinman*, 5 Conn. 164; *Clingan v. Mitchellree*, 31 Pa. St. 25; *Smith v. Fenner*, 1 Gall. 170), the burden of proof to establish such revocation must be assumed by those who affirm that the will has been revoked: *Benson v. Benson*, L. R. 2 P. & D. 172; 40 L. J. P. & D. 1; 23 L. T., N. S., 709; 21 L. T., N. S., 731; 19 Week. Rep. 190; and they must show some sufficient revocatory act, or at least offer evidence from which the existence of such act, though not directly proved, may be inferred, as where the destruction of a will is inferable from the fact that it was in the custody of the testator, but after due search cannot be found after his death.

*Declarations of Testator.* — Among the evidence offered to establish or disprove the revocation of a will may be the declarations of the testator himself, either expressly or impliedly affirming that the will has or has not been destroyed or otherwise revoked. Under the statute of wills in force in England and the different states of the American Union, declaring that wills cannot be revoked by parol acts, their revocation cannot be established by parol evidence alone. A will cannot be revoked by the dying or other declarations of the testator: *Rodgers v. Rodgers*, 8 Heisk. 489; nor are his declarations ever admissible as evidence of a revocation unless connected with some revocatory act, and tending to show that its purpose was or was not revocatory: See note to *Jackson v. Kniffen*, 3 Am. Dec. 395; *Bibb v. Thomas*, 2 W. Black. 1044; *Doe v. Perkes*, 3 Barn. & Ald. 489; *Clark v. Morrison*, 25 Pa. St. 453; *Dan v. Brown*, 4 Cow. 483; 15 Am. Dec. 395; *Randall v. Beatty*, 31 N. J. Eq. 643; *Toebbe v. Williams*, 80 Ky. 662, 665; *Jones v. Moseley*, 40 Miss. 261; 90 Am. Dec. 327; *Staines v. Stewart*, 2 Swab. & T. 320; 8 Jur., N. S., 440; 31 L. J. P. D. 10. We do not discover that conflict of authority upon this subject which some of the decisions have assumed to exist. The cases in which evidence of the declarations of the testator had been admitted have generally, if not universally, respected the rule just stated, but have justified the reception of the evidence, upon the ground that some act had been proved by direct or circumstantial evidence from which the revocation, though not necessarily established, might be inferred, and the declarations of the testator



so received in evidence were parts of the *res gestae*, or tended to show his purpose in doing the act, when the act itself, though tending to disclose his intention, did not necessarily do so. Thus in England it has been held that when, from the face of a testamentary document, it is doubtful whether or not the testator altogether revoked a prior will, the court may receive parol evidence to ascertain his intention: *Jenner v. Finch*, L. R. 5 P. D. 106; 49 L. J. P. D. 25; 42 L. T., N. S., 327; 28 Week. Rep. 520. So when a will is found in a mutilated condition, and there is doubt whether it was put in that condition by the testator with intent to revoke it, evidence of his declarations is admissible, if they are to the effect that he had revoked his will or had no will: *Lawyer v. Smith*, 8 Mich. 411; 77 Am. Dec. 460; or where the statute does not permit a partial revocation by mutilation or alteration, but does permit it to be wholly revoked in that mode; the declarations of a testator at the time he erased the name of a legatee in his will by drawing his pen through it are admissible to show whether he intended by that act to revoke the whole will or a part only: *Law v. Law*, 83 Ala. 432. If a will is torn or otherwise mutilated, declarations made by the testator that such mutilation was the act of another person not sanctioned by him may be received in support of the will: *Tucker v. Whitehead*, 59 Miss. 595; *Callagan v. Burns*, 57 Me. 449; or if the will was destroyed by another, declarations of the testator are admissible to show that he knew of such destruction, and that he did or did not intend to ratify it: *Steele v. Price*, 5 B. Mon. 63. If a will cannot be found after the death of a testator, a presumption arises that it was destroyed by him with revocatory intent, and "to repel or strengthen this presumption, the declarations of the testator are admissible": *Weeks v. McBeth*, 14 Ala. 474, and authorities cited *ante*, p. 347; and the presumption of revocation arising from a will being torn or otherwise mutilated may be strengthened by evidence of the declarations of the testator that the laws of the country were as good a will as he wanted, and that he intended his children to share equally in his property: *Patterson v. Hickey*, 32 Ga. 156.

## BERGH v. WARNER.

[47 MINNESOTA, 250.]

**HUSBAND AND WIFE.** — A WIFE IS AUTHORIZED TO PLEDGE THE HUSBAND'S CREDIT for the purpose of obtaining those necessaries which he has neglected or refused to furnish. He cannot be held liable for articles purchased by his wife when he has not neglected or refused to furnish her with suitable support.

**HUSBAND AND WIFE.** — THE TERM "NECESSARIES," as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, and even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

**HUSBAND AND WIFE.** — A WIFE MAY BE THE AGENT OF HER HUSBAND through his authorization, either expressed or implied. It is implied if he has, without objection, permitted her to contract other bills of a similar nature on his credit, or has paid such bills previously incurred.

**HUSBAND AND WIFE — IMPLIED AGENCY OF WIFE.** — A wife living with her husband is, as the head and manager of his household, presumed to have authority from him to order on his credit such goods or necessities as, in the ordinary arrangement of such household, are required for family use.

*Lewis E. Jones*, for the appellant.

*William G. White*, for the respondent.

**MITCHELL, J.** It is sought in this action to hold the defendant liable for debts contracted by his wife during coverture and cohabitation. The first cause of action is for the price of a pair of diamond ear-rings, purchased by the wife for her own use; the second is for a small sum for repairing certain articles of her jewelry. The wife has, by virtue of the marriage relation alone, no authority to bind her husband by contracts of a general nature. She may, however, be his agent, and as such bind him. This agency is frequently spoken of as being of two kinds: 1. That which the law creates as the result of the marriage relation, by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities which the husband himself has neglected or refused to furnish; 2. That which arises from the authority of the husband, expressly or impliedly conferred, as in other cases. The first of these, sometimes called an "agency in law" or an "agency of necessity," is not, accurately speaking, referable to the law of agency; for the liability of the husband in such cases is not at all dependent upon any authority conferred by him. He would, under such circumstances, be liable, although the necessities were furnished to the wife against his express orders. The real foundation of the husband's liability in such cases is the clear legal duty of every husband to support his wife and supply her with necessities suitable to her situation and his own circumstances and condition in life. But the wife's authority on this ground to contract debts on the credit of her husband is limited in its extent and nature to the legal requirements fixed for its creation, of the existence of which those persons who assume to deal with the wife must take notice at their peril. If they attempt to hold the husband liable on this ground, the burden of proof is upon them to show, — 1. That the husband refused or neglected to provide a suitable support for his wife; and 2. That the articles furnished were necessities. The term "necessaries," in its legal sense, as applied to a wife, is not con-

lined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

In regard to the much-vexed question as to how it is to be determined in a given case whether the articles furnished were necessities, the general rule adopted is that laid down by Chief Justice Shaw in *Davis v. Caldwell*, 12 Cush. 512, viz., that it is a question of fact for the jury, unless, in a very clear case, where the court would be justified in directing authoritatively that the articles cannot be necessities.

In this case the plaintiff utterly failed to establish a right to recover for the articles sued for in the first cause of action as "necessaries." Conceding, for the sake of argument, that, in view of the estate and rank of the defendant, the trial judge would have been justified in finding as a fact that diamond ear-rings were necessities, yet so far from there being any evidence that the defendant neglected or refused to provide his wife a suitable support, it affirmatively appeared that he provided for her amply, and even liberally.

The only other ground upon which the defendant could be held liable was by proof that he expressly or impliedly authorized his wife to purchase the articles on his credit. This is purely and simply a question of agency, which rests upon the same considerations which control the creation and existence of the relation of principal and agent between other persons. The ordinary rules as to actual and ostensible agency must be applied. The agency of the wife, if it exists, must be by virtue of the authorization of the husband, and this may, as in other cases, be express or implied. Her authority, however, when implied, is to be implied from acts and conduct, and not from her position as wife alone. Of course the husband, as well as every principal, is concluded from denying that the agent had such authority as he was held out by his principal to have, in such a manner as to raise a belief in such authority, acted on in making the contract sought to be enforced. Such liability is not founded on any rights peculiar to the conjugal relation, but on other grounds of universal application. By having, without objection, permitted his wife to contract other bills of a similar nature on his credit, or by payment of such bills previously incurred, and thus impliedly recognizing her authority to contract them, a husband may have clothed his wife with an ostensible agency and apparent authority to contract

the bill sued on, so as to render him liable, although she had no actual authority, just as any principal would be liable under like circumstances. It is also true that where the wife is living with her husband, she, as the head and manager of his household, is presumed to have authority from him to order on his credit such goods or services as, in the ordinary arrangement of her husband's household, are required for family use: *Flynn v. Messenger*, 28 Minn. 208; 41 Am. Rep. 279; *Wagner v. Nagel*, 33 Minn. 348. This presumption is founded upon the well-known fact that in modern society, almost universally, the wife, as the manager of the household, is clothed with authority thus to pledge her husband's credit for articles of ordinary household use. But the articles sued for here are not of that character, and no such presumption would arise from the mere fact that the parties were living together as husband and wife. To hold the husband liable, there must have been some affirmative proof of authority from him, either express or implied from his acts and conduct. In this case there is an entire absence of any evidence of express authority. Indeed, the evidence tends quite strongly to show that it was his expressed wish that his wife would incur no bills, and that his monthly allowance to her of "pin-money" was intended to avoid any occasion for her doing so. The evidence of acts and conduct on part of defendant tending to show that he had clothed his wife with apparent or ostensible authority to buy any such articles on his credit was exceedingly slight. The mere fact that he furnished his wife with expensive wearing apparel had little, if any, tendency to prove any such fact. The same may be said of the evidence that on one occasion he paid a dress-maker's bill of \$136, contracted by his wife, especially as there is no evidence that plaintiff had any knowledge of that fact. As to previous dealings between the parties, the only evidence is, that on various occasions plaintiff had sold the wife articles of jewelry for cash, but on one occasion, nearly three years before, he had sold her on credit a bill of jewelry amounting to some nineteen dollars, the principal item of which was a pair of opera-glasses of the value of twelve dollars, and that this bill was charged on plaintiff's books to the wife, but that the husband, about a year afterwards, paid it. We do think that the evidence was such as to require a finding that the wife had authority to purchase the articles on the credit of the defendant.

The other assignments of error affecting the first cause of

action are not of sufficient importance to require further mention than to say that we think they are without merit.

Upon the trial the defendant's counsel stated in open court that "defendant admits the items in the bill for repairs [the second cause of action], but disclaims any liability for the diamond ear-rings." This must be construed as an admission of the second cause of action. The trial court found against plaintiff on both causes of action. This was, of course, error. Doubtless, it was an oversight, which resulted from the court not having in mind the admission made on the trial. The mistake was one which doubtless would have been prevented or corrected, without the necessity of an appeal to this court, merely by plaintiff's counsel calling the court's attention to the matter. Under these circumstances, the amount being only \$6.50, we do not think the appellant ought to recover statutory costs.

The order appealed from is affirmed as to the first cause of action, and reversed as to the second, but without costs to either party.

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**HUSBAND AND WIFE.** — During cohabitation, a wife has ordinarily a *prima facie* agency to purchase on her husband's credit such supplies as are necessary for herself and the family, and suitable to their situation and condition of life: *Baker v. Carter*, 83 Me. 132; 23 Am. St. Rep. 764, and note; *Vusler v. Cox*, 53 N. J. L. 516. But a husband is not liable to the vendor of goods, not necessities, sold to his wife on his credit, after an express notice from him to the vendor not to sell to her without his authority: *Segelbaum v. Esrminger*, 117 Pa. St. 248; 2 Am. St. Rep. 662. A wife may, as agent of her husband, make him responsible on contracts, if the circumstances are such as to show his assent, express or implied: *Mackinley v. McGregor*, 3 Whart. 369; 31 Am. Dec. 522, and note; *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 384, and note.

**HUSBAND AND WIFE — DEFINITION OF TERM "NECESSARIES."** — As to what are "necessaries," see *Ounningham v. Irwin*, 7 Serg. & R. 247; 10 Am. Dec. 458, and particularly note 462-465; *Stanton v. Willson*, 3 Day, 37; 3 Am. Dec. 255; *Carstens v. Hanselman*, 61 Mich. 426; 1 Am. St. Rep. 606. But see *St. John's Parish v. Bronson*, 40 Conn. 76; 16 Am. Rep. 17.

## STEWART v. DUNCAN.

[47 MINNESOTA, 285.]

OFFICER'S RETURN IS USUALLY CONCLUSIVE upon the same parties in the same action, and others in privity with them, but in other actions is *prima facie* evidence only.

OFFICER'S RETURN SHOWING THAT A JUDGMENT HAS BEEN SATISFIED by a sale under execution issued thereon may be avoided in a subsequent action, by proving that the property sold did not produce a satisfaction of the judgment, for the reason that it was claimed by a third person, who sued the sheriff therefor, and recovered the value thereof.

*H. J. Peck*, for the appellant.

*R. H. McClelland*, for the respondent.

VANDERBURGH, J. Plaintiff sues to recover for work and labor upon the farm of defendant. She, in her answer, pleads a judgment recovered by plaintiff for the same cause of action against her husband, and also alleges that an execution issued to the sheriff to enforce the judgment was returned wholly satisfied, and was accordingly satisfied of record. The reply shows that the plaintiff in fact realized nothing upon the judgment, for the reason that the property levied on by the sheriff was claimed by the defendant, who recovered a judgment for the value thereof against the sheriff, who was indemnified by the plaintiff, and the latter was obliged to pay the same. The defendant's counsel does not claim that the judgment in question is an estoppel as between these parties, and admits that upon the proper application, the plaintiff would be entitled to have the sheriff's return upon the execution vacated, but he insists that it is conclusive until vacated. The question whether the plaintiff is concluded by the return of the sheriff in the former suit still remaining of record arises upon the demurrer of defendant to the reply, and is the only question which we are required to consider upon this appeal; and as respects this question, it is sufficient to say that the rule is too well settled to render discussion necessary. The return of the officer usually concludes the parties in the same action, and others in privity with them, but in other actions it is only *prima facie* evidence, and may be contradicted or explained: *Browning v. Hanford*, 7 Hill, 120; Vin. Abr., tit. Return, O, pp. 199, 203. It surely would not bind the defendant in this action. It would not be conclusive against or for her; hence neither party is estopped by it: 2 Freeman on Executions, sec. 365. The demurrer was properly overruled.

Order affirmed.

**OFFICER'S RETURN, CONCLUSIVENESS OF.** — A sheriff's return, regular on its face, is conclusive upon the parties to the suit and their privies: *McDonald v. Leewright*, 31 Mo. 29; 77 Am. Dec. 631, and note; *Thomas v. Ireland*, 88 Ky. 581; 21 Am. St. Rep. 356, and note; but as to persons not parties, such return is merely *prima facie* evidence of the facts therein stated: Note to *Henderson v. Henderson*, 19 Am. St. Rep. 657. An officer's return to a writ is *prima facie* evidence, even in his own favor: *State v. Devitt*, 107 Mo. 573; *post*, p. 440. In *Coburn v. Goodall*, 72 Cal. 498, 1 Am. St. Rep. 75, the sheriff's return to a writ of restitution was held to be only *prima facie* evidence under the California Political Code, sec. 4178. In *Martin v. Aultman*, 80 Wis. 150, a return of service of summons signed "M. B., by J. B., Deputy Sheriff," was held to be presumptively correct, it being in due form; Compare *Martin v. Gray*, 19 Kan. 458; 27 Am. Rep. 149; *Bond v. Wilson*, 8 Kan. 228; 12 Am. Rep. 466; *Nall v. Granger*, 8 Mich. 450; 77 Am. Dec. 462, and note; *Mineral Point R. R. Co. v. Keep*, 22 Ill. 9; 74 Am. Dec. 124, and note; *Duinel v. Soper*, 32 Me. 119; 52 Am. Dec. 643, and note; *Mewis v. Hamman*, 5 Whart. 150; 34 Am. Dec. 546, and note, where the conclusiveness of officers' returns is discussed.

## RUSSELL v. MERCHANTS' BANK.

[47 MINNESOTA, 236.]

**WASTE — CO-TENANCY.** — NEITHER A GRANTEE NOR A MORTGAGEE OF A TENANT IN COMMON is entitled to an injunction to prevent another co-tenant from carrying on the business of making brick upon and out of the lands of the co-tenancy, where works had been constructed upon such land for the carrying on of such business, and the business itself undertaken before such grant or mortgage was executed.

*Stocker and Matchan*, for the appellants.

*Gilfillan, Belden, and Willard*, for the respondent.

VANDEBURGH, J. Plaintiff holds a mortgage upon an undivided half of the land described in the complaint, executed by Willis Baker, August 15, 1884. The land referred to then contained large deposits of clay, suitable for making brick, and the mortgagor and one Wright, who were rightfully in possession of the premises, were, in 1883, engaged in the manufacture of brick from the clay thereon, and so continued to do until long after the execution of the mortgage referred to. In the spring of 1884, and several months prior to the date of mortgage, they built and constructed buildings and erected machinery upon the premises, for the purpose of manufacturing brick thereon. Subsequently the defendants Willis G. Baker and Benjamin H. Billings entered into possession, and continued the manufacture of brick on the land, under a con-

tract for the purchase thereof, and are still so engaged. It appears that the undivided half of the premises so mortgaged is insufficient security for the encumbrances thereon, and the removal of the clay deposits in question has impaired and is depreciating plaintiff's security, and that the mortgagor is insolvent. The value of the mortgaged premises with the clay is found to be four thousand five hundred dollars, and four thousand dollars exclusive of it. Upon this state of facts the plaintiff applied to the court for and the court ordered an injunction to issue, pending the foreclosure proceedings, restraining the defendants Baker and Billings from digging or removing the clay in or upon the soil of the land in question, and particularly described in the complaint. It will be observed that the last-named defendants are the equitable owners of the undivided half of the premises not covered by the mortgage, as well as that portion mortgaged, and as such owners entitled to enjoy the possession of the whole, subject to the mortgage upon the undivided half referred to.

It may be conceded that the unauthorized digging of clay by a tenant is waste when there is nothing in the situation of the premises or other special circumstances to take the case out of the general rule: *Livingston v. Reynolds*, 2 Hill, 157. And so in special cases an injunction will issue to restrain injuries to the freehold in the nature of waste between tenants in common: *Hawley v. Clowes*, 2 Johns. Ch. 122; *Coffin v. Loper*, 25 N. J. Eq. 443; *Atkinson v. Hewitt*, 51 Wis. 275. But where works, of the character described, for carrying on the business of making brick, have been constructed and established, and the business lawfully undertaken by the owners of the land, we are of the opinion that, as between the subsequent grantee of an undivided interest in the land and co-tenants in possession, it is not waste for the latter to continue the business in the customary way, and that to so continue the manufacture is within the legitimate exercise of the enjoyment of their property by such co-tenants. And such grantee would not, therefore, be entitled to an injunction against them, restraining such use of the premises and breaking up or suspending the business: *Neel v. Neel*, 19 Pa. St. 323; *McCord v. Oakland etc. Mining Co.*, 64 Cal. 134; 49 Am. Rep. 686. But if excluded from his share, he would undoubtedly be entitled to an accounting: *Kean v. Connelly*, 25 Minn. 222; 33 Am. Rep. 458. A mortgagee of an undivided interest should not be held to occupy any better position than a tenant in common. He would not



in such case be entitled to an injunction. The most he could claim would be, upon a proper showing, to have a receiver appointed, and an order for an accounting for the rent or use of the share mortgaged.

Order reversed.

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**CO-TENANCY — WASTE.** — For the application of the doctrine of waste as between tenants in common, see *Dodd v. Watson*, 4 Jones Eq. 48; 72 Am. Dec. 577; *Graham v. Pierce*, 19 Gratt. 28; 100 Am. Dec. 658; *Hancock v. Day*, 1 McMull. Eq. 69; 36 Am. Dec. 293; *Nelson v. Clay*, 7 J. J. Marsh. 138; 23 Am. Dec. 387; *Johnson v. Johnson*, 2 Hill Ch. 277; 29 Am. Dec. 72. In *Farabow v. Green*, 108 N. C. 339, where a testator devised to four of his children land "in common to their use" during their natural lives, two of said children being married and two being single, providing that should the two single children both or either of them marry, they should share equally with the married children, with the request that the land be kept in common to their use and benefit during the natural life of either or all of them, and further providing that "at the death of the four children above named, all said property then remaining be sold and the proceeds divided between all my heirs," the court decided that the estate of the four children was not impeachable for waste, though they might be enjoined in a proper case from despoiling the inheritance.

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## LARSON v. CHASE.

[47 MINNESOTA, 307.]

**BURIAL RIGHTS.** — A WIDOW HAS THE RIGHT TO THE CUSTODY OF THE BODY OF HER DECEASED HUSBAND for the purpose of preservation, preparation, and burial, and may maintain an action against any one who mutilates or destroys it.

**BURIAL RIGHTS.** — WHILE THERE IS NO PROPERTY IN THE DEAD BODY of a human being, in the commercial sense of the term, yet those who are entitled to its possession and custody for the purpose of burial have legal rights in it which the law recognizes and protects, and any interference with such rights is an actionable wrong.

**BURIAL RIGHTS.** — Damages are recoverable from one who mutilates or destroys a human body, and mental suffering is an element of such damages when it is the direct, proximate, and natural result of the wrongful act.

**DAMAGES.** — MENTAL SUFFERING IS A PROPER ELEMENT OF DAMAGE when it is one of the direct, proximate, and natural consequences of an actionable wrong.

*Bradish and Dunn, and Babcock and Garrigues*, for the appellant.

*Arctander and Arctander*, for the respondent.

**MITCHELL, J.** This was an action for damages for the unlawful mutilation and dissection of the body of plaintiff's de-

ceased husband. The complaint alleges that she was the person charged with the burial of the body, and entitled to the exclusive charge and control of the same. The only damages alleged are mental suffering and nervous shock. A demurrer to the complaint, as not stating a cause of action, was overruled, and the defendant appealed.

The contentions of defendant may be resolved into two propositions: 1. That the widow has no legal interest in or right to the body of her deceased husband, so as to enable her to maintain an action for damages for its mutilation or disturbance; that if any one can maintain such an action, it is the personal representatives; 2. That a dead body is not property, and that mental anguish and injury to the feelings, independent of any actual tangible injury to person or property, constitute no ground of action.

Time will not permit, and the occasion does not require, us to enter into any extended discussion of the history of the law, civil, common, or ecclesiastical, of burial and the disposition of the body after death. A quite full and interesting discussion of the subject will be found in the report of the referee (Hon. S. B. Ruggles) in the *Matter of the Widening of Beekman Street*, 4 Bradf. 503. See also *Peirce v. Proprietors etc.*, 10 R. I. 227; 14 Am. Rep. 667. Upon the questions who has the right to the custody of a dead body for the purpose of burial, and what remedies such person has to protect that right, the English common-law authorities are not very helpful or particularly in point, for the reason that from a very early date in that country the ecclesiastical courts assumed exclusive jurisdiction of such matters. It is easy to see, therefore, why the common law in its early stages refused to recognize the idea of property in a corpse, and treated it as belonging to no one unless it was the church. The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead, and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters, and administer remedies as in other analogous cases. This has been accomplished by a process of gradual development, and all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the

deceased by domestic ties, and that this is a right which the law will recognize and protect. The general, if not universal, doctrine is, that this right belongs to the surviving husband or wife, or to the next of kin; and while there are few direct authorities upon the subject, yet we think the general tendency of the courts is to hold, that in the absence of any testamentary disposition, the right of the surviving wife (if living with her husband at the time of his death) is paramount to that of the next of kin. This is in accordance, not only with common custom and general sentiment, but also, as we think, with reason. The wife is certainly nearer in point of relationship and affection than any other person. She is the constant companion of her husband during life, bound to him by the closest ties of love, and should have the paramount right to render the last sacred services to his remains after death. But this right is in the nature of a sacred trust, in the performance of which all are interested who were allied to the deceased by the ties of family or friendship, and if she should neglect or misuse it, of course the courts would have the power to regulate and control its exercise. We have no doubt, therefore, that the plaintiff had the legal right to the custody of the body of her husband for the purposes of preservation, preparation, and burial, and can maintain this action, if maintainable at all.

The doctrine that a corpse is not property seems to have had its origin in the *dictum* of Lord Coke (3 Inst. 203), where, in asserting the authority of the church, he says: "It is to be observed that in every sepulchre that hath a monument two things are to be considered, viz., the monument, and the sepulture or burial of the dead. The burial of the cadaver that is *caro data vermibus* [flesh given to worms] is *nullius in bonis*, and belongs to ecclesiastical cognizance; but as to the monument action is given (as hath been said) at the common law, for defacing thereof." If the proposition that a dead body is not property rests on no better foundation than this etymology of the word "cadaver," its correctness would be more than doubtful. But while a portion of this *dictum*, severed from its context, has been repeatedly quoted as authority for the proposition, yet it will be observed that it is not asserted that no individual can have any legal interest in a corpse, but merely that the burial is *nullius in bonis*, which was legally true at common law at that time, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts. But

whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it, which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control. But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is, that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right, by mutilating or otherwise disturbing the body, is an actionable wrong. And we think it may be safely laid down as a general rule, that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation.

It is also elementary that while the law, as a general rule, only gives compensation for actual injury, yet, whenever the breach of a contract or the invasion of a legal right is established, the law infers some damage, and if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Every injury imports a damage. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as a distinct element of damage, is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery could be had for mental suffering, placing it on the ground that mental suffering, as a distinct element of damage, is never a proper subject of compensation, when the correct ground was, that the act complained of was not an infringement of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate effect of the wrongful act. Counsel cites the leading case of *Lynch v. Knight*, 9 H. L. Cas. 577, 598. We think he

is laboring under the same misconception of the meaning of the language used in that case into which courts have not infrequently fallen. Taking the language in connection with the question actually before the court, that case is not authority for defendant's position. It is unquestionably the law, as claimed by appellant, that "for the law to furnish redress there must be an act which, under the circumstances, is wrongful; and it must take effect upon the person, the property, or some other legal interest of the party complaining. Neither one without the other is sufficient." This is but another way of saying that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act. It was early settled that substantial damages might be recovered in a class of torts where the only injury suffered is mental,—as, for example, an assault without physical contact. So, too, in actions for false imprisonment, where the plaintiff was not touched by the defendant, substantial damages have been recovered, though physically the plaintiff did not suffer any actual detriment. In an action for seduction, substantial damages are allowed for mental sufferings, although there be no proof of actual pecuniary damages other than the nominal damages which the law presumes. The same is true in actions for breach of promise of marriage. Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always, in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument. In *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759, where the defendant entered upon plaintiff's land, and dug up and removed the dead body of his child, it was held that plaintiff might recover compensation for the mental anguish caused thereby. It is true that in that case the court takes occasion to repeat the old saying that a dead body is not property, and makes the gist of the action the trespass upon plaintiff's land; but it would be a reproach to the law if a plaintiff's right to recover for mental anguish, resulting from

the mutilation or other disturbance of the remains of his dead, should be made to depend upon whether, in committing the act, the defendant also committed a technical trespass upon plaintiff's premises, while everybody's common sense would tell him that the real and substantial wrong was not the trespass on the land, but the indignity to the dead.

Order affirmed.

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**DEAD BODIES—BURIAL RIGHTS.** — Bodies of the dead belong to the surviving relatives in the order of inheritance, like other property, and such relatives, and not the executor or administrator, have the right to the custody and burial thereof: *Renihan v. Wright*, 125 Ind. 536; 21 Am. St. Rep. 249, and note.

**DAMAGES—MENTAL ANGUISH.** — For the recovery of damages for mental anguish, see *Western U. Tel. Co. v. Rogers*, 68 Miss. 748; 24 Am. St. Rep. 300, and note; *West v. Western U. Tel. Co.*, 39 Kan. 93; 7 Am. St. Rep. 530, and note 534-537. Mental suffering and physical pain, as elements of damages, cannot be dissociated, and the law furnishes no standard by which to measure and compensate either in money: *Montgomery etc. Ry Co. v. Mallette*, 92 Ala. 210.

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## MILLER v. McCARTY.

[47 MINNESOTA, 321.]

**MISTAKE, EFFECT OF CORRECTION OF.** — If a mistake is made in a seed-grain note which is intended to be secured by a crop growing upon certain land, the maker may, on discovering the mistake, execute a new note without releasing the lien on the crop, because if he did not do so voluntarily, he might be compelled by a court of equity, in a suit to reform the original note to conform to the actual agreement of the parties.

**MARSHALING SECURITIES.—WHERE EXEMPT AND NON-EXEMPT PROPERTY** is mortgaged to secure a debt, and a subsequent lien-holder has a lien on the property not exempt, the mortgagor can compel the original mortgagee to first exhaust the non-exempt property. The right of the mortgagor to his exemption is superior to the equity of the junior creditor.

**MARSHALING SECURITIES—WAIVER OF RIGHT TO.** — A MORTGAGOR OF PROPERTY, part of which is exempt from execution, loses his right to compel the mortgagee to first exhaust the non-exempt property if he fails to reasonably assert such right. Nor can the mortgagor require the mortgagee to litigate a doubtful action with a third person for the purpose of protecting the mortgagor's right of exemption.

*F. L. Cliff*, for the appellant.

*E. T. Young*, for the respondent.

**MITCHELL, J.** The defendant bought of plaintiff a quantity of seed-wheat, and as security for the purchase price, executed a seed-grain note, and also a chattel mortgage on two cows

and two horses. Subsequently, defendant, having discovered that a mistake had been made in the description of the land upon which the grain was to be sown, executed another seed-grain note, antedated as of the date of the first one, and of the same tenor, except that it described correctly the land upon which the grain was sown. During the intervening time, and after the grain was sown, one Clark attached the crops as the property of the defendant. The plaintiff claims that the second seed-grain note was executed merely to correct the mistake in the first one, while defendant claims that it was given and accepted as absolute payment of the first, and consequently had the effect of discharging the chattel mortgage. We think the undisputed facts in the case conclusively establish that the second note was given merely to correct the mistake in the first, and consequently did not affect the lien of the mortgage. Even if plaintiff had promised to satisfy the mortgage, the agreement would not have been enforceable, because without consideration. Undoubtedly one note may be accepted as payment of another, and in such case no consideration, other than the new note, is necessary to support the contract. But here the new note, when given, was merely a fulfillment of the original contract, and was nothing more than plaintiff was entitled to, or than the law would have compelled by correcting the instrument so as to conform to the actual agreement of the parties. "The debt has never been paid, the mortgage has never been actually released, and default has been made in its conditions. Consequently plaintiff is entitled to the possession of the mortgaged property, unless his acts and conduct have been such as to operate in law as a discharge of the lien of the mortgage, or to estop plaintiff from asserting that lien against the defendant. The mortgaged property was exempt, while part of the crop covered by the lien of the seed-grain note was not; and the defense of the defendant is, in substance, that he had a right to require the plaintiff to first exhaust the non-exempt grain before resorting to the exempt property covered by the mortgage; that he made this demand, but that plaintiff and Clark, the attaching creditor, combining together to deprive him of this right, so conducted matters that the non-exempt grain was all applied on Clark's claim, leaving plaintiff's claim to be satisfied wholly out of the exempt property, and therefore plaintiff is now estopped from asserting the lien of his mortgage. Of course, in this defendant assumes that Clark's attachment lien was

subsequent to the lien of plaintiff's seed-grain note, for if it was prior to it, the entire foundation falls out from under defendant's case.

The marshaling of securities between different classes of creditors, where a first mortgage covers both exempt and non-exempt property, and the subsequent lien of another creditor covers only the non-exempt property, is a subject upon which there is a conflict of decisions. The question has generally arisen where the exempt property involved was a homestead, but we see no reason for applying any different rule to homestead exemptions from that to be applied to any other exempt property. The doctrine of some courts is, that the power of a court to compel a mortgagee to resort, in the first instance, to one of several estates mortgaged, is exercised only for the protection of the equities of different creditors or encumbrancers, or of sureties, and never for the benefit of the mortgagor; and that the fact that the first mortgage is on exempt as well as non-exempt property, and the second lien only on the non-exempt, does not change the general equity rule that a person having a right to resort to two funds, in one of which alone another person has a junior lien, shall be compelled to first exhaust the fund to which the other cannot resort: *Searle v. Chapman*, 121 Mass. 19; *Jones v. Dow*, 18 Wis. 241; *White v. Polleys*, 20 Wis. 503; 91 Am. Dec. 432; *Chapman v. Lester*, 12 Kan. 592; *Plain v. Roth*, 107 Ill. 588; *Webster v. Bronston*, 5 Bush, 521 (divided court); *State Savings Bank v. Harbin*, 18 S. C. 425; *Hallman v. Hallman*, 124 Pa. St. 347. In other states it is held that as the mortgage of exempt property for a particular debt is only a waiver of the exemption as to that debt, and only to the extent necessary to satisfy that debt, therefore the right of the mortgagor to his exemption, which is favored by the law, is superior to the equity of the junior creditor; and consequently the general rule as to marshaling assets between different creditors does not apply to such cases, but, on the contrary, the mortgagor has the right, not only as against the mortgagee, but also as against subsequent encumbrancers, to require the first mortgagee to exhaust the non-exempt property before resorting to the exempt: *Armitage v. Toll*, 64 Mich. 412; *McLaughlin v. Hart*, 46 Cal. 638; *Wilson v. Patton*, 87 N. C. 318. In *McArthur v. Martin*, 23 Minn. 74, and *Horton v. Kelly*, 40 Minn. 193, this court adopted the latter rule, at least where the second lien has been acquired by proceedings *in invitum*, and not by the contract of the debtor.



But this rule, like all the rules relating to the marshaling of assets, is one founded on the basis of mere equity, and will not be enforced to the displacement of a countervailing equity, or where, for any special facts, it would be inequitable to enforce it. It is a right which the debtor must seasonably assert for himself. The mortgagee owes him no duty to assert it for him, or to institute proceedings to protect it. The equity is simply one which the law will protect, upon seasonable application of the mortgagor, where the mortgagee proceeds to enforce his mortgage.

In this case it appears that Clark levied his attachment in April, obtained his judgment, issued execution, and levied it on the crop in May. Defendant practically abandoned the growing crop to the sheriff, who proceeded to harvest and thrash it, and then hauled it to an elevator, after turning over nearly one third of it to defendant as his exemption, the entire cost of all this coming out of the non-exempt part; so that, after paying expenses, Clark realized on his claim only about sixteen dollars, while defendant got his exemption harvested and thrashed free of expense. So far as appears, defendant never asserted the right he now claims until after the grain was harvested and thrashed, when he made demand on the sheriff that the plaintiff's seed-grain note be first paid out of the wheat. But this availed nothing. The sheriff was not plaintiff's agent. He was simply the agent of the law, enforcing Clark's execution, with which plaintiff had nothing to do. It is true that it appears that the sheriff told Clark of defendant's demand, and it is said that Clark was plaintiff's agent for the collection of his note. But it does not appear that Clark was plaintiff's agent at this time. It does appear that plaintiff delivered the note to Clark for collection in October, but it nowhere appears when the sheriff communicated defendant's demand to Clark. No proceedings were taken by plaintiff to enforce his mortgage until the institution of this suit in the latter part of November, when for the first time defendant notified plaintiff of his claim by demanding that he take the grain on the seed-grain note, instead of taking the cattle and horses on the mortgage. At this time the wheat was in the elevator, whither it had been taken by the sheriff, so that the demand of the defendant was, in effect, that he should have the benefit of all the enhanced value of the grain resulting from all the expenditures of Clark or of the sheriff in his behalf in harvesting, thrashing, and marketing the crop.

And right here there is a fatal defect in defendant's proof. Conceding all that defendant claims as the law, yet in no event would plaintiff's mortgage be discharged, except *pro tanto*, to the extent of the value of the non-exempt property which he might and should have taken and applied on the note. Now, while defendant did prove that the value of the grain in the elevator was enough to pay plaintiff's note, yet there is not a particle of evidence what it was worth as a standing crop, unless it is to be inferred from the fact that Clark only realized sixteen dollars out of it after paying expenses and setting aside defendant's exemption. There is another important fact. It was and still is an open question whether Clark's attachment was prior or subsequent to the lien of plaintiff's seed-grain note. That would depend upon whether Clark had notice of the mistake in the description of the land in the first note before he levied his attachment. Now, plaintiff was under no obligation to litigate this question with Clark for the purpose of protecting defendant's right of exemption. It was the duty of defendant himself to assume that responsibility if he wished to protect that right. In short, in any view of the case, defendant has failed to show that plaintiff has disregarded any legal duty which he owed him, or that he himself is in a position to demand the application in his favor of the equitable rule which he now invokes. Consequently no reason is shown why plaintiff is not entitled to the possession of the property according to the terms of this mortgage.

Order affirmed.

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**MARSHALING SECURITIES.** — Where a husband and wife execute a mortgage upon their homestead, and other realty owned by the wife, and she afterwards executes to another person a mortgage upon the same realty, excepting the homestead, in a suit to foreclose the mortgages the first mortgagee will not be required to exhaust the fund derived from a sale of the homestead before resorting to the land covered by the second mortgage. The court has no authority to impose upon the homestead a greater burden than has been placed thereon by the parties themselves or by the law: *Mitchelson v. Smith*, 28 Neb. 583; 25 Am. St. Rep. 357; *Marr v. Lewis*, 31 Ark. 203; 25 Am. Rep. 553; *Dickson v. Chorn*, 6 Iowa, 19; 71 Am. Dec. 382, and note. See also *Georgia Chem. Works v. Cartledge*, 77 Ga. 547; 4 Am. St. Rep. 98, and note; *Hudkins v. Ward*, 30 W. Va. 204; 8 Am. St. Rep. 22, and note. In *Hodges v. Hickey*, 67 Miss. 715, where a husband fraudulently conveyed realty to his wife, including his homestead, and subsequently they joined in conveying the whole realty to secure a debt due by her to an innocent person, the court decided that the husband's creditors, though not able to reach the homestead, were however entitled to a decree that it should be first sold under the mortgage, so as to subject the rest of the land, after the satisfaction of the mortgage, to

the satisfaction of their claims. In *Sholl v. Young*, 32 N. C. 462, the court, however, decided that where property was sold under consent for enough to pay a senior judgment having a lien upon the judgment debtor's homestead, equities not having been reserved, junior judgment creditors cannot sell the homestead to pay the senior judgment.

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## STATE v. HACKETT.

[47 MINNESOTA, 425.]

**CRIMINAL LAW — BURGLARY AND LARCENY.** — One who enters a building under such circumstances as to constitute a burglary, and also commits therein the crime of larceny, may be prosecuted, convicted, and punished for each crime separately.

**CRIMINAL LAW. — PLEA OF AUTREFOIS ACQUIT** is not sustained by proof that the accused, who is under indictment for larceny, was previously indicted for burglary, and on his trial finally acquitted, and that at such trial, the testimony relied upon to convict him tended to prove that at the time and place of the alleged burglary, he stole the property described in the indictment for larceny.

*J. J. McCafferty*, for the appellant.

*Moses E. Clapp*, attorney-general, and *T. D. O'Brien*, for the state.

**COLLINS, J.** Defendant was convicted of the crime of grand larceny in the second degree, and appeals from an order refusing a new trial. The essential allegations of the indictment were that in the night-time of a specified day, and from and out of the properly described room of one Robinson, defendant wrongfully, unlawfully, and feloniously took, stole, and carried away certain personal property belonging to the last-named person, and of the value of twenty-five dollars. At the proper time defendant entered a plea of *autrefois acquit*, and for the purpose of determining the issue presented by a stipulation as to the facts, the state demurred to the plea. From the stipulation it appeared that defendant had been twice indicted by the same grand jury. One of these indictments was that above mentioned, while the other was for the crime of burglary in the first degree. A trial was had upon the indictment last mentioned, resulting in an acquittal, wherein testimony was introduced tending to show that at the same time and place of the alleged burglary, defendant stole the property described in the pending indictment for larceny. It also appeared from the stipulation that the testimony was produced for the purpose of proving an intent to commit, and

the commission of, the crime of burglary. While the facts which should have appeared in this plea of former acquittal were not lucidly set forth in the stipulation, we assume that the larceny and the alleged burglary were connected, and were but parts of the same transaction, so that the testimony in relation to the lesser crime was of the *res gestæ*; and we also assume that the acquittal was on the merits.

Section 393 of the Penal Code would seem to cover this case were any statutory enactment necessary when the code was adopted. This section provides that "a person who, having entered a building under such circumstances as to constitute burglary in any degree, commits any crime therein, is punishable therefor, as well as for the burglary, and may be prosecuted for each crime separately." Although declared by statute, this is no new statement of the law applicable to the case at bar: See 2 Hale P. C. 245; 1 Bishop's Crim. Law, sec. 1062; *State v. Warner*, 14 Ind. 572; *Wilson v. State*, 24 Conn. 57; *Bell v. State*, 48 Ala. 684; 17 Am. Rep. 40; *People v. Garnett*, 29 Cal. 622. The reason is quite obvious. The commission of the crime of larceny is not necessarily included in that of burglary, and when tried for the latter offense, the defendant could not have been convicted of the crime of larceny under any of the provisions of Gen. Stats. 1878, c. 114, sec. 19, or otherwise, notwithstanding the fact that testimony relative to the commission of that crime—undoubtedly because it was part of the *res gestæ*—had been produced. In 1 Bennett and Heard's Leading Criminal Cases, 2d ed., 538, the following proposition was laid down after an examination of the authorities, viz.: A former conviction or acquittal of a higher offense is a bar to a prosecution for the same act charged as a less offense, if, on trial of the former, the defendant might have been, upon any competent evidence, legally convicted of the latter. The converse of this rule, as stated in the same authority, was approved by this court in *State v. Wiles*, 28 Minn. 381. This defendant was not in jeopardy a second time for the same offense, and the trial court was correct when sustaining a demurrer to the plea.

From the record before us, it is not perfectly apparent that the objection now urged that the sufficiency of the indictment, because it failed to allege that the personal property described therein was taken by defendant with the intent mentioned in that part of section 415 of the code which defines the crime of larceny, was raised or even referred to in the court below; but

be that as it may, we are of the opinion that when, in an indictment for the crime of larceny, it is explicitly charged, as it was in the pleading now under consideration, that defendant feloniously took, stole, and carried the property away from the owner, the intent to deprive the true owner of it is sufficiently and adequately alleged. The remaining assignments of errors have no merit.

Order affirmed.

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**CRIMINAL LAW — FORMER JEOPARDY.** — Under the Texas statutes a conviction for burglary does not bar a prosecution of the same defendant for a conspiracy to commit such burglary: *Whitford v. State*, 24 Tex. App. 489; 5 Am. St. Rep. 896; and see also note 899-901 to the same case appended. In *Bell v. State*, 48 Ala. 684, 17 Am. Rep. 40, where, under an indictment charging both burglary and larceny, the prisoner was found guilty of burglary only, which conviction was afterwards reversed, and upon a second trial the jury found the accused guilty of larceny, the court decided that the latter verdict was a nullity, inasmuch as the former verdict was in effect an acquittal of the charge of larceny, that the jury should have found defendant guilty of burglary at the second trial, and that their discharge without having done so operated as an acquittal of the charge of burglary. As to whether an acquittal or conviction of burglary bars a prosecution for larceny, see note to *Roberts v. State*, 58 Am. Dec. 542. In *Powell v. State*, 89 Ala. 172, a conviction of petit larceny in the recorder's court of the city of Montgomery, under the provisions of the city's charter, was held to constitute a bar to a prosecution before a state court for the crime of burglary, where the two crimes charged were based upon the same transaction.

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## JOHNSON v. HARRISON.

[47 MINNESOTA, 375.]

**CONSTITUTIONAL LAW — PROBATE CODE CONTAINS BUT ONE SUBJECT.** — The provision in the constitution declaring that "no law shall embrace more than one subject, which shall be expressed in its title," is not violated by the enactment of a statute, consisting of 326 sections, entitled "An act to establish a probate court," forming a complete system of statutory law relating to and connected with those matters of which, under the constitution, probate courts have jurisdiction, to wit, estates of deceased persons, and of persons under guardianship, and also including the subject of title to real property by descent.

**CONSTITUTIONAL LAW. — THE PROHIBITION IN THE CONSTITUTION AGAINST ENACTING LAWS WHICH EMBRACE MORE THAN ONE SUBJECT** must be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical and natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection or relation to each other. All that is necessary is, that the act shall embrace some one general sub-

ject; and by this is meant merely that all matters treated of should fall under some one general idea, and be so connected with and relate to each other, either logically or in popular understanding, as to be parts of and germane to one general subject.

*John D. O'Brien, H. F. Stevens, and Edward B. Graves, for the appellant.*

*Henry J. Horn and John W. Lane, for the respondent.*

MITCHELL, J. Chapter 46, Laws 1889, entitled "An act to establish a probate code," is divided into 21 subchapters, containing 326 sections. The intention of the legislature obviously was to enact, in the form of one act, a complete system of statutory law relating to or connected with those matters of which, under the constitution, probate courts have jurisdiction, to wit, "estates of deceased persons and of persons under guardianship." It is contended that the act is repugnant to section 27, article 4, of the constitution of the state, which provides that "no law shall embrace more than one subject, which shall be expressed in the title"; that the act embraces several distinct and separate subjects, some of which, particularly subchapter 3, relating to title to real property by descent, are not expressed in the title.

The purposes of such a constitutional provision, the mischiefs which it is designed to prevent, the rules to be applied to its construction, and the tests to be applied to determine whether a law is repugnant to it, are so familiar, and have been so often passed upon by this and other courts, that they need only be referred to very briefly. Its purposes are two: 1. To prevent what is called "log-rolling legislation" or "omnibus bills," by which a number of different and disconnected subjects are united in one bill, and then carried through by a combination of interests; 2. To prevent surprise and fraud upon the people and the legislature by including provisions in a bill whose title gives no intimation of the nature of the proposed legislation, or of the interests likely to be affected by its becoming a law; and in deciding whether an act is obnoxious to this provision of the constitution, a very good test to apply is, whether it is within the mischiefs intended to be remedied.

Again, while this provision is mandatory, yet it is to be given a liberal, and not a strict, construction. It is not intended nor should it be so construed as to embarrass legislation by making laws unnecessarily restrictive in their scope

and operation, or by multiplying their number, or by preventing the legislature from embracing in one act all matters properly connected with one general subject. The term "subject," as used in the constitution, is to be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical or natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection with or relation to each other. All that is necessary is, that the act should embrace some one general subject; and by this is meant, merely, that all matters treated of should fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of or germane to one general subject. The large number of related or cognate matters often treated of under some comprehensive title, such as "Criminal Code," "Penal Code," "Code of Civil Procedure," "Private Corporations," "Railroad Corporations," and the like, are familiar illustrations of what may be legitimately included in one act. Any construction of this provision of the constitution that would interfere with the very commendable policy of incorporating the entire body of statutory law upon one general subject in a single act, instead of dividing it into a number of separate acts, would not only be contrary to its spirit, but also seriously embarrassing to honest legislation. All that is required is, that the act should not include legislation so incongruous that it could not, by any fair intendment, be considered germane to one general subject. The subject may be as comprehensive as the legislature chooses to make it, provided it constitutes, in the constitutional sense, a single subject, and not several. The connection or relationship of several matters, such as will render them germane to one subject and to each other, can be of various kinds, as, for example, of means to ends, of different subdivisions of the same subject, or that all are designed for the same purpose, or that both are designated by the same term. Neither is it necessary that the connection or relationship should be logical; it is enough that the matters are connected with and related to a single subject in popular signification. The generality of the title of an act is no objection, provided only it is sufficient to give notice of the general subject of the proposed legislation, and of the interests likely to be affected. The title was never intended to be an index of the law.

Tested by these general rules, we are of opinion that the probate code embraces a single general subject, and that this subject is sufficiently expressed in its title.

In our judgment, much of the argument of counsel for respondent rests upon an entirely too limited and narrow definition of the meaning of the words "probate" and "code." They seem to construe the title of the act as if it read "An act to establish a probate court code of procedure." The word "code," as now generally used, and as obviously used in this title, means "a system of law,"—"a systematic and complete body of law." And while the word "probate" originally meant merely "relating to proof," and afterwards "relating to the proof of wills," yet in the American law it is now a general name or term used to include all matters of which probate courts have jurisdiction, which in this state are "the estates of deceased persons and of persons under guardianship." Hence the term "probate code" may and should be construed as meaning "the body or system of law relating to the estates of deceased persons, and of persons under guardianship." In common understanding, this is as distinct and clearly defined a branch of the law as is criminal law or corporation law, and in popular signification the term "probate law" includes all matters of which probate courts generally have jurisdiction, among which is "estates of deceased persons." An examination of this act will show that all its provisions are connected with this general subject. The fact that some of them relate to matters of mere procedure, while others define and fix rights of property, is no valid objection to the law. The same objection might be urged against many acts the constitutionality of which has never been questioned. Neither is the fact important that a law contains matters that might be, and usually are, contained in separate acts, or would be more logically classified as belonging to different subjects, provided only they are germane to the general subject of the act in which they are put. The legislature is not limited to the most logical or philosophical classification. The law of wills and of title to property by descent is a part of the law relating to the estates of deceased persons, and hence is, in popular understanding, if not logically, a part of the general subject of probate law. If a party dies testate, the will has to be probated, and the estate administered, distributed, and assigned according to the provisions of the will; if he dies intestate, his estate has to be administered, distributed, and assigned



according to the law of succession and inheritance. In the one case, the probate court has to determine whether the will has been executed according to law, and if so, then construe its provisions; in the other case, it has to determine who are the distributees or heirs, according to the statute. Of course it is the law, and not the court, which determines in the one case what shall constitute a valid will, and in the other who shall be the heirs or distributees of an intestate; but this has no bearing upon the question under consideration. This is equally true in any case, for a court does not make, but merely administers, the law, and is bound to follow the law, even in matters of mere procedure.

We have not overlooked the suggestion (the most forcible one made by respondent) that the law casts the descent, and determines in whom the title to property left by an intestate shall vest, and that this title may be asserted by the heir in courts other than probate, and wholly independent of any action of or administration in the latter. But it is nevertheless true that the law which declares who shall be the heirs of an intestate is a part of the law relating to the estates of deceased persons, and that usually administration proceedings are had, and the estate distributed or assigned, by decree of the probate court, and that this is in fact necessary in order to complete the chain of title of record. Hence, in popular understanding at least, the law of descents is connected with and related to the general subject of probate law. It is certainly not so distinct or discordant a matter as to justify a court in holding the act unconstitutional, as embracing two subjects; and looking at the matter from a practical stand-point, it seems to us that such legislation is not within the mischiefs intended to be remedied.

The classification of the law of wills and of title by descent, in an act dealing with probate matters and probate law, is not unusual. These matters have been treated of under such titles as "Decedents" (Nebraska), "Probate Practice Act" (Montana), "Courts of Probate and their Jurisdiction" (Connecticut). These are not cited as authorities as to what might be constitutionally embraced in one act in this state, for in some instances they had no such constitutional provisions as the one now being considered, and in other cases, perhaps, general revisions of the statutes were excepted from its operation. But they are cited to show that such a classification is not arbitrary or incongruous, but that in the understanding of legislatures,

and even of lawyers engaged in revising the statutes, such matters as the law of wills and of title by descent have frequently been considered as having such connection with and relationship to probate law as to justify their being treated of under that general head or title. If there is any fair reason for such a classification, it is enough to sustain the law; for when the matter is so closely connected with the subject of the act as to create a reasonable doubt as to whether or not it is included within one general subject, a court will not hold the act invalid. To use the language of the supreme court of the United States in the case of *Montclair v. Ramsdell*, 107 U. S. 147, in which a similar question was involved: "The objection should be grave, and the conflict between the statute and the constitution palpable, before the judiciary should disregard a legislative enactment on the sole ground that it embraced more than one subject, or if but one subject, that it was not sufficiently expressed by the title."

Order reversed.

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**STATUTES — REQUIREMENT THAT A LAW SHALL EMBRACE BUT ONE SUBJECT.**

— Upon the question of the effect of the constitutional prohibition against statutes embracing more than one subject, see *Hronek v. People*, 134 Ill. 139; 23 Am. St. Rep. 652, and note; *Richman v. Supervisors*, 77 Iowa, 513; 14 Am. St. Rep. 308; *People v. Dunn*, 80 Cal. 211; 13 Am. St. Rep. 118; *Davis v. State*, 7 Md. 151; 61 Am. Dec. 331, and note 337-346; *Neuendorff v. Duryea*, 69 N. Y. 557; 25 Am. Rep. 235, and note 239-246; *State v. Orrick*, 106 Mo. 111. A constitutional provision requiring statutes to be limited to one subject must be construed liberally; *McGurn v. Board of Education*, 133 Ill. 123. A bill which has but one general object, which is fairly expressed in the title thereof, is not objectionable on the ground that it contains more than one subject; *Kansas City etc. R. R. Co. v. Frey*, 30 Neb. 790. An act entitled "An act creating the office of state supervisor of oil inspection, prescribing the duties thereof, and providing for the appointment of such supervisor, abolishing the office of chief of the division of mineral oils and state inspector of oils, repealing all laws inconsistent therewith, and declaring an emergency," does not violate the constitutional provision against embracing more than one subject in a statute; *State v. Hyde*, 129 Ind. 296. Under such a constitutional provision, a statute should embrace but one subject, and its title should express only such subject; but when the subject is sufficiently expressed, all matters fairly connected with it, as well as all measures which may facilitate its accomplishment, may be incorporated in the statute; *Vas Brunt v. Flatbush*, 126 N. Y. 50.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI.**

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**SULLIVAN v. HANNIBAL AND ST. JOSEPH RAILROAD  
COMPANY.**

[107 MISSOURI, 66.]

**MASTER AND SERVANT—FOREMAN OF LABORERS VICE-PRINCIPAL, NOT FELLOW-SERVANT, WHEN.** — A foreman having charge of laborers engaged in the removal of a railroad company's building is a vice-principal of the company, and not a fellow-servant of the laborers.

**DEFECTIVE APPLIANCE, LIABILITY OF MASTER FOR INJURY TO SERVANT RESULTING FROM THE USE OF.** — Where a foreman, who is the vice-principal of a railroad company, orders a laborer to use a defective staging, and injury results to the latter from such use, the company is liable therefor. And although the laborer injured knew, to a certain extent, of the defect in such staging, but did not know the danger to which he was subjected by reason of the defect, while the foreman did know it, or could have known it if he had done his duty, the company will be liable for the injury resulting from the fall of such defective staging.

**ACTION for damages for personal injuries.** The opinion states the facts. The following instructions were given at the plaintiff's request: "1. If you believe from the evidence that at the time and place in evidence, the plaintiff was in the employment of and at work for the defendant, under the orders, direction, and control of a foreman who acted for the defendant in superintending the men employed and the work then being done in the removal of the defendant's ice-house; that while so engaged in that work, a defect was discovered in the tie-beam supporting the scaffolding in evidence; that plaintiff did not know of both the defect and the increased danger arising therefrom; that defendant's said foreman did know of said defect and its dangerous character; that with such knowledge said foreman assured the plaintiff and his fellow-workmen

that the defect did not render the scaffolding dangerous or unsafe, or stated to or in the hearing of plaintiff that said scaffolding was all right, or words to that effect; and that the plaintiff, relying upon such statements of said foreman, and being directed by said foreman to do work which obliged him to go upon said scaffolding, stepped upon said scaffolding, which, on account of this defect, gave way, and thereby precipitated the plaintiff to the ground; and that in consequence thereof he was injured, — then the plaintiff was not guilty of such contributory negligence as will preclude a recovery in this case, and you should find for the plaintiff, unless you further find that said defect and its dangerous character were so obvious that a man of ordinary care and prudence would not have stepped upon said scaffolding.

"2. It was the duty of the defendant to use ordinary care to furnish for the use of the plaintiff and his fellow-workmen a scaffolding that was reasonably safe for the purposes for which it was intended and used; and if you find that defendant negligently failed to perform this duty, and furnished a scaffolding that was unsafe; that the defendant's foreman in charge of the men and the work knew of the unsafe condition of said scaffolding, and that with such knowledge upon the part of its said foreman, the said foreman further negligently failed to either remedy the defect or warn the plaintiff of the danger of going upon said scaffolding, and that the plaintiff, while in the observance of ordinary care, and without negligence upon his part, and without knowledge of the unsafe condition of said scaffolding, went upon said scaffolding in the performance of the duty assigned him, and by reason of the defect therein was thrown to the ground and injured, — then the plaintiff is entitled to recover.

"3. If the defendant's foreman knew of the defect in the scaffolding in proof, and the danger likely to ensue therefrom, it was his duty, if reasonably within his power, to remedy such defect, or warn the plaintiff of the danger, and thereby prevent the injury consequent therefrom.

"4. The fact that the plaintiff had some knowledge or notice of a defect in the tie-beam supporting the scaffolding in evidence may properly be considered by you in determining the question as to whether, by going upon the same while engaged in the work in which he was employed, the plaintiff was guilty of such negligence as contributed to his injury; yet this fact alone will not preclude a recovery upon his part,

unless the danger from such defect was at the time so obvious or glaring as to deter a man of ordinary prudence from going where plaintiff went, and doing what he then did in the performance of the duty assigned him.

"5. The words 'ordinary care,' as used in these instructions, is that degree of care which a person of ordinary prudence would observe under like circumstances; and 'negligence,' as used in these instructions, is the omission or failure of such a person to observe such care.

"6. The court instructs the jury that if you should find for the plaintiff, you should assess his damages at such sum as you may believe him entitled to under the evidence in this case, but in an amount not exceeding ten thousand dollars. And in arriving at the amount of damages, you should take into consideration the nature and extent of the injuries received by plaintiff, together with the pain and suffering, if any, caused thereby."

The following instructions were given at the defendant's request: —

"1. The jury are instructed that they cannot infer or presume negligence on the part of the defendant from the happening of the accident to plaintiff. It devolves upon the plaintiff to establish by a preponderance of the evidence, — 1. That the defendant was guilty of negligence in not exercising ordinary care to provide plaintiff with a safe and sufficient staging on which to stand; 2. That plaintiff's injuries resulted solely from such negligence on the part of the defendant; and 3. That plaintiff did not know, and could not by the exercise of ordinary care and prudence have known, of the unsafe and insufficient condition of said staging, if it was in fact unsafe and insufficient; and unless the plaintiff has established each and all of these facts by a fair preponderance of all the evidence, your verdict must be for the defendant.

"2. If the jury believe from the evidence that at the time of the accident to the plaintiff the staging referred to in the evidence was in such a condition that it could be used with safety by a person exercising ordinary care and prudence, they must find for the defendant.

"3. The court instructs the jury that the plaintiff, in assisting to remove said section of the roof which had been used as a part of the staging off from over said broken tie-beam, was bound to exercise that degree of care and caution which would have been observed by a person of ordinary prudence,

under similar circumstances; and if you find that the plaintiff might, by the exercise of ordinary care, have avoided injury, your verdict must be for the defendant.

"4. If the staging provided by defendant to enable plaintiff and his fellow-workmen to take down and remove the roof of the ice-honse mentioned in the petition was defective, insufficient, and unsafe, and plaintiff knew it, and notwithstanding such knowledge, 'and knowing same had not been repaired,' ventured upon and used such staging in removing said roof, or a part thereof, then plaintiff cannot recover in this case, although the jury may believe from the evidence that said staging could easily have been repaired, and that defendant failed to have the same done."

And the following instructions were asked by the defendant and refused:—

"5. The court instructs the jury that under the pleadings, and the evidence in this case, the verdict must be for the defendant.

"6. If the jury believe from the evidence that Sullivan knew that the tie-beam was broken or cracked before he stepped on the same, then the verdict must be for the defendant.

"7. If the jury believe from the evidence that at the time of the accident to plaintiff, the staging mentioned in evidence was in such a condition that it could not, with reasonable care, be used with safety, and such unsafe condition was known to the plaintiff, or by the exercise of ordinary care could have been known to him prior to the accident, they must find for the defendant.

"8. If the tie-beam mentioned in plaintiff's petition was weak and defective, as therein stated, and plaintiff, while assisting in removing the section of the roof which was over the same, stepped upon the said tie-beam and the same gave way, and plaintiff, by reason thereof, fell, and received the injuries complained of thereby, then he is not entitled to recover, and your verdict will be for the defendant.

"9. If you find from the evidence that the defendant had an abundance of lumber and material out of which a safe and secure staging might have been constructed, which they were at liberty to use for that purpose, and that the plaintiff and his fellow-workmen, including the foreman, Prather, instead of making use of such materials, chose to make use of the tie-beam in said building to aid them in erecting the staging,

and that in consequence of the fact that said tie-beams were not sufficiently strong and suitable for that purpose, the plaintiff fell, and was injured, your verdict must be for the defendant.

"10. The defendant, in selecting material for tie-beams in said building, was only bound to provide such as was suitable and sufficient to answer the purpose for which tie-beams are intended, and for which they were placed in said building. They were not bound to be strong enough to permit the same being used for a purpose for which they were never intended.

"11. The plaintiff, in his testimony, admits that he knew that the tie-beam mentioned in evidence had cracked at about ten o'clock on the day he was injured, and that he knew that one of the sections of the roof had been let down and placed and kept over the said beam, to keep the men from stepping on it; and the court instructs you that the plaintiff, having this knowledge, was charged with notice of the existence of a defect in said tie-beam, and he would be required to examine and determine for himself the character and extent of this defect before trusting his weight upon it, and should be held to know each and every fact in regard to said defect, which such an examination would have made known to him; and if you believe from the evidence that plaintiff stepped upon said beam without having made an examination to ascertain the character of the defect in the same, and that such examination would have disclosed to the plaintiff the danger of stepping on said beam, your verdict must be for the defendant.

"12. The plaintiff admits that he knew that the tie-beam mentioned in evidence had cracked at about ten o'clock on the day he was injured; that he knew that a section of the roof had been let down and placed and kept over the defect in said beam to prevent any injury occurring to any one therefrom; and that with such knowledge he continued to work at the business in hand, and attempted to assist in removing the section of roof from over said defective beam; and the court instructs you that the plaintiff, having this knowledge, was charged with notice of the existence of a defect in said tie-beam, and would be required to ascertain and know for himself the character and extent of this defect before trusting his weight upon it; and if you believe from the evidence that the plaintiff, with such knowledge, stepped on said beam without making a sufficient examination to ascertain the strength of

the same, or the character and extent of the defect in the same, your verdict must be for the defendant.

"13. If the plaintiff knew that the tie-beam mentioned in evidence had cracked early in the day, and that, in order to remedy the defect in the same, a section of the roof had been let down over such defective beam so as to be used as a staging or scaffolding over the said defective tie-beam, and with such knowledge the plaintiff continued at said work without protest or complaint, and was afterward, while removing such section of the roof off from over said defective tie-beam, injured, then he cannot recover, and your verdict must be for the defendant.

"14. There is no evidence tending to show that Prather, the foreman, was charged with the duty of providing suitable lumber and materials out of which to construct the staging mentioned in the evidence.

"15. If the defendant, to enable the plaintiff and his fellow-workmen to remove the roof of the ice-house mentioned in plaintiff's petition, provided a staging consisting of planks placed across the tie-beams of said house, and if the plaintiff, while assisting in removing the section of said roof mentioned in said petition, stepped off of said staging and upon a defective tie-beam, which gave way because it was not sufficient to bear his weight, and plaintiff, because of said tie-beam giving way, fell and received the injuries complained of, he is not entitled to recover, and your verdict will be for defendant.

"16. The statement of the foreman, Prather, to the effect that said tie-beam would be all right if the section of the roof was let down upon and used as a staging over the same, was not an expression of an opinion upon which plaintiff could rely while engaged in removing such section of the roof off from over such defective tie-beam."

*L. H. Waters, and Spencer, Burns, and Mosman, for the appellant.*

*C. O. Tichenor, and Crittenden, Stiles, and Gulkerson, for the respondent.*

SHERWOOD, P. J. Action for damages for injuries resulting to plaintiff in consequence of the falling of a portion of a scaffold or staging upon which plaintiff and other carpenters, under Prather, their foreman and the agent of the defendant, were engaged in removing an ice-house of the latter, which was to be erected at another place.



The work was begun by sawing the roof into sections of seven or eight feet in width, and letting them down upon a staging then being erected by some of the carpenters while plaintiff and Lauffer were upon the roof engaged in sawing the roof into sections. This staging was formed by placing posts under the center of each of the tie-beams, which theretofore had been employed to keep the building from spreading, so that the tie-beams would sustain the sections of the roof when let down upon them, and two rows of plank, two by twelve, were placed on and spiked to the tie-beams down through the center to work from. Planks which had been used as collar-beams were thrown by the workmen across the tie-beams as they were taken down.

About ten, A. M., as they let down the first section at the northeast corner, which was about seven by sixteen feet, a cracking was heard below it, and plaintiff says he felt the staging sinking, and the foreman went below and reported to the men, including plaintiff, that there was a knot in the beam, and that it was all right if they would put the section of the roof over it as a staging, which was done. The broken tie-beam was under about the center of the section. They took down the entire roof by sections, and then proceeded to take them off by pushing them over the sides of the building. In the afternoon, between two and four, P. M., and after all the sections but the one in question had been taken down, they reached the section which covered the broken tie-beam, and attempted to remove it as the others. Plaintiff and several others were on top, and raised the inner end of that section, and were pushing it to get it over the plate onto skids placed on the outside against the building. While so doing, and after the section had been moved two or three feet, plaintiff says something gave way under him, and he went down and was injured.

Prather was present at the time of the removal of this last section, and gave orders for its removal, as he himself testifies, and there is other testimony to the same effect, and there can be no question from the testimony but that the fall of the plaintiff was owing to the broken tie-beam, and that plaintiff was not aware that a portion of the defective tie-beam had fallen out, leaving the other portion wholly unsupported, and of this the foreman Prather was aware. Prather stood in the attitude, not of a fellow-servant of plaintiff, but as the vice-principal, the *alter ego*, of the defendant company: *Moore v. Wabash*

*etc. R'y Co.*, 85 Mo. 588; *McDermott v. Hannibal etc. R. R. Co.*, 87 Mo. 285.

That company was bound to use due care in the erection of reasonably safe staging on which plaintiff could work, especially as he was not engaged in the construction of that staging; and, failing to do this, the company, which was represented by Prather, became responsible for the injury resulting to plaintiff therefrom. This is not a case like the *Armour case*, 111 U. S. 315, where the question turns upon the liability of the master to one fellow-servant, resulting from injuries inflicted through the negligence of a co-employee, but the original negligence of the master manifested in a variety of ways by the defendant company through its appointed representative. It was the clear duty of that representative to have repaired the broken tie-beam, or never to have used it in the first instance without making the necessary repair thereto.

And having given the plaintiff the original assurance that the staging was safe, the fact that Prather was present, and ordered and superintended the removal of the last section of the roof when the accident occurred, was tantamount to a tacit assertion that it was safe for plaintiff to proceed with the removal of that section, and plaintiff was not bound to search for danger, but had a right to rely upon the judgment and discretion of the defendant's foreman that he would fully perform the measure of his duty towards him.

The plaintiff, indeed, knew to a certain extent of the defect in the tie-beam, but he did not know of the danger to which he was subjected by reason of the defect, which Prather did or would have known had he discharged his duty in this regard. These principles are recognized in the somewhat recent case of *Bowen v. Chicago etc. R'y Co.*, 95 Mo. 277, although they were not directly involved: See the cases there cited, especially *Arkerson v. Dennison*, 117 Mass. 407; also *Wood on Master and Servant*, 2d ed., secs. 354, 376.

The instructions given and refused will accompany this opinion, and as we are not able to see that any material error in regard to their being given or refused has occurred, we affirm the judgment.

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**MASTER AND SERVANT — FOREMAN OF LABORERS WHETHER VICE-PRINCIPAL.** — A foreman who has charge of his employer's coal business, and the unloading of vessels laden with coal, with power to employ, direct, and control the men engaged in the master's business, is not a fellow-servant with them, so as to relieve the master from liability for his negligence: *Brown v.*

*Gilchrist*, 80 Mich. 56; 20 Am. St. Rep. 496, and note. A foreman employed by a railroad company, having charge of a gang of men who are subject to his orders only, is the agent of the company, and not a fellow-servant with the laborers: *Stephens v. Hannibal etc. R. R. Co.*, 96 Mo. 207; 9 Am. St. Rep. 336, and note. It is the duty of the master to provide reasonably safe appliances to a servant, and when this duty is delegated to an agent, such agent stands in the place of the principal: *Lewis v. Seifert*, 116 Pa. St. 628; 2 Am. St. Rep. 631, and note. A foreman who has the control, direction, and supervision of a gang of railroad employees, with authority to employ and discharge them, is not a vice-principal, but a fellow-servant, and the company will not be liable for injury to an employee, caused by his negligence: *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621, and note.

**MASTER AND SERVANT—INJURY TO SERVANT FROM DEFECTIVE APPLIANCES—MASTER'S LIABILITY.**—A master must use due care in supplying his servants with safe appliances and a safe place in which to work, and cannot escape liability by intrusting such duty to an agent: *Ell v. Northern Pac. R. R. Co.*, 1 N. D. 336; 26 Am. St. Rep. 621, and note. A master and servant do not stand on an equal footing, even though they have equal knowledge of the danger. The servant occupies a position of subordination, and may rely upon the superior skill and knowledge of the master, and is not free to act upon his own suspicions: *Shortel v. St. Joseph*, 104 Mo. 114; 24 Am. St. Rep. 317, and note. A servant's right to recover is not barred by knowledge of defects whereby injury results to him, unless he also has knowledge that the defects are dangerous: *Faren v. Sellers*, 39 La. Ann. 1011; 4 Am. St. Rep. 256, and note; *St. Louis etc. R'y Co. v. McClain*, 80 Tex. 86.

## VAN DE VERE v. KANSAS CITY.

[107 MISSOURI, 82.]

**CONSTITUTIONAL LAW—PROPERTY NOT "DAMAGED" WITHIN MEANING OF CONSTITUTION UNLESS IT IS SPECIALLY AFFECTED.**—The owner of property, to be entitled to compensation for property damaged by a public improvement, must show that either the property itself or some right or easement connected with it is directly affected, and that it is specially affected in a manner not common to the property owner and the public at large. The owner of a city lot cannot, therefore, enjoin the city from erecting a fire-engine house upon an adjacent lot until compensation is first made to him for the anticipated depreciation in the value of his property, in consequence of the noise and bustle incident to such a structure, where no special and peculiar damage is shown.

**NUISANCE PER SE, FIRE-ENGINE HOUSE IN CITY IS NOT.**—A fire-engine house in a city, erected under a power given by its charter, is not per se a nuisance.

**INJUNCTION.** The opinion states the case.

*F. F. Rozzelle, W. S. Cowherd, and F. H. Dexter*, for the appellants.

*Karnes, Holmes, and Krauthoff*, for the respondent.

BLACK, J. Plaintiff is the owner of two lots on Brooklyn Avenue in Kansas City, and the defendant city is the owner in fee of a lot adjoining the plaintiff's lots. After the city had let a contract, and commenced the construction of a fire-engine house upon the lot owned by it, the plaintiff commenced this suit, praying for an injunction. The circuit court found that the plaintiff would be greatly damaged by the use of the building for a fire-engine house, and enjoined the city and the contractors from proceeding with the work until compensation should be made to the plaintiff for such damage. From that decree the city appealed.

The plaintiff produced evidence to the following effect: That his lots are suitable for residence purposes only; that a number of residences had been erected in the immediate neighborhood; that he had in contemplation the erection of a residence on his lots, and that his property would be decreased in value from thirty-five to fifty per cent by the erection of the building by the city; one witness says to the amount of two thousand five hundred dollars. The evidence of three physicians is, that the noise and commotion incident to such a structure would be uncomfortable and annoying to persons living in adjoining houses, and might have a damaging effect upon their nervous systems. These same witnesses say that other property on the same street, and in the same block, would also be injured, but not to the same extent.

On the other hand, a physician of twenty-five years' standing testified that he owned and resided on property next to one of these engine-houses, and that his property was not depreciated in value, nor was the health of his family affected thereby. Another witness gave evidence to the same effect. The proposed structure is to be set back ten or fifteen feet from the street line. It is designed for one hose-wagon, a span of horses, and five men. The alarm apparatus consists of a gong with telephone attachments. Fire-bells are not used; but the alarms are loud enough to awaken the men.

1. An examination of the evidence leads us to the conclusion that the damages are overestimated by some of the witnesses; but for all the purposes of this case it will be assumed that the plaintiff's property will, to some extent, be depreciated in value by the erection of the fire-engine house, and the use of the same for the designed purpose.

Our constitution of 1875 declares "that private property shall not be taken or damaged for public use without just

compensation." The same clause in prior constitutions did not contain the word "damaged"; and the first question is, whether the change in the organic law secures to the plaintiff compensation for the damages which he will sustain under the circumstances of this case. Previous to the constitution of 1875 a very restricted meaning had been given to the words "taken" and "property." Thus it was held in *St. Louis v. Gurno*, 12 Mo. 415, and affirmed in *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89, that the city was not liable in damages resulting to a property owner from grading and paving a street, where the work was done under an ordinance authorized by the charter. The reason assigned was, that to grade a street dedicated to public use was not the appropriation of private property to public use, but simply the exercise of a lawful power over what had become public property, and that the property owner had no remedy for such consequential damages. And in *Hoffman v. St. Louis*, 15 Mo. 651, the same rule was applied where the grade of the street had been changed. The rule of these cases was disapproved in *Thurston v. City of St. Joseph*, 51 Mo. 510, 11 Am. Dec. 463, but in the case of *Schattner v. City of Kansas*, 53 Mo. 162, the court returned to the old doctrine, and so the law continued down to the adoption of the constitution of 1875. The only exceptions were in those cases where the city charters or authorized ordinances prescribed a different rule. Cooley, in speaking of what would constitute a taking, says: "Any proper exercise of the powers of government, which does not directly encroach upon the property of an individual, or disturb him in its possession or enjoyment, will not entitle him to compensation, or give him a right of action": Cooley on Constitutional Limitations, 5th ed., 671. And it is said in *Transportation Co. v. Chicago*, 99 U. S. 635: "Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action." Such were the rulings under former constitutions.

The eminent domain clause was amended so as to include cases where property is damaged, as well as "taken," to overcome the hardship growing out of the old rules; and what we are at this time concerned with is, whether the amendment

embraces cases like the one in hand. Thus far we have held that the amendment does extend to those cases where property is damaged by reason of a change in the grade of a street on which the property abuts, and this, too, though the city had the charter power to change the grade: *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Kansas City Cable R'y Co.*, 94 Mo. 574; 4 Am. St. Rep. 396.

In the case of *Rude v. City of St. Louis*, 93 Mo. 408, the plaintiff owned property on High Street, five hundred feet distant from a point where railroad tracks crossed that street. The tracks were depressed by authority of authorized ordinances from four to six feet, to conform to a system of bridges then in process of erection. The street was allowed to remain in this condition, impassable for teams, for three years. The suit was one to recover damages for alleged permanent injuries to the property and depreciation in the rental value thereof, because of the obstruction in the street, and we held the plaintiff could not recover. A like result was reached in *Fairchild v. St. Louis*, 97 Mo. 85, and in *Canman v. St. Louis*, 97 Mo. 92. These cases were like the *Rude* case, except that in one plaintiff's property was 350 feet, and in the other 125 feet, from the same obstruction. It was then held that to bring a case within the amendment, the plaintiff, if suing for consequential damages, must show that he suffered an injury special and peculiar to his property, and that it was not enough to show a damage the same in kind as that suffered by other persons, though different in degree. The plaintiffs in those cases were not deprived of access to the street, nor were any of their property rights disturbed. The inconvenience was the same as that of other persons desiring to pass on and along the street. It seems to be held, under the English lands clauses consolidation act, that to recover for land "injuriously affected," the plaintiff must show that he has sustained a peculiar damage: 3 Sedgwick on Damages, 8th ed., sec. 1092.

Judge Dillon shows with great clearness that the old line of decisions overlooked the fact that an easement or incorporeal right annexed to land, as that of ingress and egress and light, is as much property as the right to the land itself, and that the various constitutional amendments were designed to protect these rights; but that it was not the intention of these amendments to create a right, and to give a remedy in all cases of consequential damages for injuries to private property. He says: "A city, for example, under legislative au-

thority, might condemn land for the purpose of establishing a hospital thereon, or a prison, which, if established, would have the consequential effect to injure or depreciate the market or actual value of property in the neighborhood. Such injuries, however, would not, in our judgment, be within the constitutional amendment. This amendment must, as it seems to us, be limited to cases where the *corpus* of the owner's property itself, or some appurtenant right or easement connected therewith, or by the law annexed thereto, is directly (that is, in general, if not always, physically) affected, and is also specially affected (that is, in a manner not common to the property owner and to the public at large); and such direct and special injury must be such as to depreciate the value of the owner's property": 2 Dillon on Corporations, 4th ed., sec. 587 d.

Mr. Lewis, though following a very liberal interpretation of the words "injured," "damaged," says: "Unless the owner is disturbed in the enjoyment of some right which he is entitled to make use of in connection with his property, he cannot recover. If the loss or depreciation arises from the mere proximity of the work or improvement, or from its unsightly nature, or its incongruity with the uses to which the neighboring property is put, there can be no recovery. There are no decided cases to which we can refer on this point, but we can easily illustrate our meaning. Suppose the public authorities purchase or condemn a lot in a fashionable residence locality, and erect and maintain a jail thereon, and suppose the direct effect is to depreciate the surrounding property twenty-five or fifty per cent. Is the property so depreciated damaged, injured, or injuriously affected within the meaning of the provisions in question? We answer in the negative, because the owners have not been disturbed, either in the enjoyment of their estates or of any right connected with their estates": Lewis on Eminent Domain, sec. 236.

The amendment must be construed and applied in view of the evils which it was designed to remedy. We have seen that before this amendment there were many cases where the *corpus* of the property was not taken, yet rights directly annexed to the property were injured, and that for such consequential damages the property owner had no remedy, because the act was authorized by law. Whether the plaintiff must now, in all cases when claiming that his property has been "damaged" for public use, show that the injury is one for which he might have maintained an action if the act had not

been done by authority of law, we need not say in this case. What we do say is this, that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected.

The plaintiff in this case has failed in both of these respects. In the first place, his property is not directly affected by the proposed structure, — he is not deprived of any access to the street or any other incorporeal right annexed or attached to his property. Again, the annoyance which he or those occupying the property as a residence will be obliged to endure is not different from that to other persons within the sound of the gong or the commotion incident to the house, though it may be greater in degree. His property is not specially affected. If the plaintiff is entitled to damages in this case, then compensation must be allowed for any depreciation in the market value of property arising from the erection of a court-house, jail, or other public building. The text-writers cited say such cases are not within the amendment, and to this we agree.

2. The defendant, it is admitted, has the charter power to erect fire-engine houses within the city; and it cannot be said that such a structure is a nuisance. That it may become one, by improper use, may be conceded, but that furnishes no ground for enjoining the erection of the house. There is some evidence that this building could be placed within a block or two of the present site, among shops and small stores, so as not to annoy residences; but so long as the house is not made a nuisance by improper use, it is not for the courts to say where it shall be placed. People who congregate in cities must be prepared to submit to some inconveniences.

The judgment in this case is reversed and the bill dismissed.

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**DAMAGES FOR INJURY TO PROPERTY, WHEN RECOVERABLE.** — When, by the construction of any works, there is a physical interference with any right, public or private, which the owner of property is entitled to make use of in connection with such property, there is a right to compensation, if, by reason of such interference, the value of the property is lessened: *Gainsville etc. Ry Co. v. Hall*, 78 Tex. 169; 22 Am. St. Rep. 42, and note. Property is "damaged for public use," within the meaning of the constitution, when an abutting proprietor is damaged by the grade of street being established or an established grade being altered: *Sheehy v. Kansas City etc. Ry Co.*, 94 Mo. 574; 4 Am. St. Rep. 396, and extended note. Depriving one of the beneficial use of his land is in the sense of the law a taking of his lands: *Boston etc. Mill Corp. v. Newman*, 12 Pick. 467; 23 Am. Dec. 622.



**INJUNCTION TO RESTRAIN DAMAGES.** — Where it does not appear that a person will sustain any special or peculiar damages in consequence of an obstructed highway, an injunction will not be granted at his suit to restrain such obstruction: *Dawson v. St. Paul etc. Ins. Co.*, 15 Minn. 136; 2 Am. Rep. 109. Although the use of property may be unlawful or unreasonable, unless special damage is shown a neighboring property owner cannot base thereon any private right of action: *Crawford v. Tyrrell*, 128 N. Y. 341. An action on behalf of an adjacent land-owner will not lie to recover damages from the improper construction of a building, where it is not apparent that damage from that source will inevitably ensue; nor for having opened an alley which might but has not become a nuisance: *Sikes v. Miller*, 54 Ark. 533.

## CITY OF ST. LOUIS v. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

[107 MISSOURI, 92.]

**MUNICIPAL CORPORATION COMPELLED TO PAY DAMAGES RESULTING FROM  
DEFECTIVE SIDEWALK CANNOT RECOVER BACK FROM ABUTTING OWNER.**

— A municipal corporation cannot recover back from an owner of property fronting on one of its streets damages which it has been compelled to pay to a person for injuries received by reason of its failure to keep the sidewalk in front of said property free from snow and ice, notwithstanding an ordinance of the city requires such owner to keep his sidewalk free from snow and ice, and imposes a penalty for its violation.

*W. C. Marshall*, for the appellant.

*Lee and Ellis, and Montague Lyon*, for the respondent.

**BRACE, J.** This is an appeal from the judgment of the circuit court sustaining a demurrer to plaintiff's petition. The cause of action set up in the petition is, that the plaintiff, by the final judgment of the circuit court of the city of St. Louis, was compelled to pay one Mattie C. Norton the sum of \$1,291.18 damages and costs, for injuries received by her from a fall in passing over a sidewalk on Locust Street, in said city, in front of defendant's property, made dangerous and unsafe by an accumulation of snow and ice thereon, which the defendant suffered and allowed to remain in violation of the city ordinances, wherefore the city asks judgment for the amount it was so compelled to pay. The ordinances recited in the petition require the owners to keep the sidewalk and gutters in front of their property clean, and after any fall of snow to cause the snow to be immediately removed from the sidewalk fronting their property into the carriage-way of the street, and declare any person failing to comply with this requirement

guilty of a misdemeanor, upon conviction of which such person is to be fined not less than five nor more than twenty dollars.

Before the judgment against the city in favor of Mrs. Norton became conclusive, the case was reviewed on appeal in this court: *Norton v. City of St. Louis*, 97 Mo. 537. In that case the city undertook to devolve upon the defendant here primary liability for the injuries Mrs. Norton received by reason of the unsafe and dangerous condition of the sidewalk on which she fell. We there held that it was the duty of the city to keep its sidewalks in a reasonably safe condition for persons traveling thereon, and that it could not evade or cast this duty upon others, and took occasion to say: "Conceding that the city has the power to cause obstructions upon the sidewalk to be removed at the expense of the owners of the ground fronting thereon (Charter, art. 8, sec. 21, par. 9), and that the ordinances requiring such owners immediately after any fall of snow to cause the same to be removed is a legitimate mode of exercising that power, yet the city could not, by passing such an ordinance, relieve itself of its duty to the plaintiff and to the public traveling on its streets of keeping its sidewalks in a reasonably safe condition for travelers thereon, or transfer or impose that duty upon another; nor can its liability for a failure to discharge that duty be made contingent upon the liability of the citizen to the city for a failure to discharge his duty to the city in the matter of removing the snow as required by ordinance. For a neglect of this duty of the citizen, the city might impose such a penalty as would be calculated to secure its performance, if it has the power to impose such a burden; but it could not create a liability to a civil action for damages by a private individual against one who failed to discharge the city's duty in that behalf."

While there is respectable authority for the position that a municipal corporation cannot impose upon the citizen the obligation to keep the public sidewalk in front of his premises free from obstruction by snow, etc., at his own expense (*Gridley v. City of Bloomington*, 88 Ill. 554; 30 Am. Rep. 566; *Chicago v. O'Brien*, 111 Ill. 532; 53 Am. Rep. 640), the weight of authority is, however, the other way, and in favor of the position tentatively stated in the foregoing *dicta* as to such power (many of the cases are cited in brief of plaintiff's counsel). From the exercise of this power by the city through its ordinances creating such a duty upon the part of the defendant in

the present case, counsel for plaintiff deduce the conclusion, that for a failure of the defendant to discharge its duty to the city under the ordinances, the city has a right over to recover back from the defendant the damages it was compelled to pay to Mrs. Norton. But this does not follow. The damages recovered by Mrs. Norton were for a breach of the city's duty to keep its streets reasonably safe from defects resulting from the operation of natural causes. To Mrs. Norton the defendant owed no such duty. The only duty it owed, in regard to the sidewalk, was to the city; that duty was created by the city in its ordinances, in which it prescribed for itself and its citizens the measure of damages for its neglect in the penalty imposed for their violation. The damages the city was compelled to pay may have been the result of its failure to promptly and efficiently enforce its ordinances. But it was its duty to enforce them, and not that of the citizen; the duty of the citizen is to obey, and if he fail to obey, to pay the penalty which the city imposes for such failure, and not the damages which the city may be compelled to pay for its neglect to perform its duty.

The doctrine on this subject is tersely stated in 2 Shearman and Redfield on Negligence, section 343, as follows: "An abutting owner, as such, owes no duty to maintain the street or sidewalk in front of his premises, and is not responsible for any defects therein which are not caused by his own wrongful act. He may, consequently, like any other person using the sidewalk in front of his premises, recover for an injury from a defect therein against the city whose duty it was to keep it in repair. The fact that he violates a city ordinance, which requires abutting owners to remove snow and ice from the sidewalk in front of their premises within a certain time after their accumulation, does not render him liable to one injured by falling upon such snow and ice, nor to the city which had suffered judgment for the same injury." In support, see *Kirby v. Boylston Market Ass'n*, 14 Gray, 249; 74 Am. Dec. 682; *Vandyke v. Cincinnati*, 1 Disney, 532; *Heeney v. Sprague*, 11 R. I. 456; 23 Am. Rep. 502; *Flynn v. Canton Co.*, 40 Md. 312; 17 Am. Rep. 603; *Moore v. Gadsden*, 98 N. Y. 12; *City of Hartford v. Talcott*, 48 Conn. 526; 40 Am. Rep. 189; *City of Keokuk v. District of Keokuk*, 53 Iowa, 352; 36 Am. Rep. 226; 2 Black on Judgments, sec. 575; 2 Dillon on Municipal Corporations, 4th ed., secs. 1012, 1035. We have found no case in conflict with the doctrine thus stated. The case of *Borough*

of *Brookville v. Arthurs*, 130 Pa. St. 501, certainly is not; for there the right to recover by the borough is predicated expressly upon an agreement for a good consideration to keep the sidewalk in repair.

The demurrer was properly sustained, and the judgment of the circuit court is affirmed.

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**MUNICIPAL CORPORATIONS — RECOVERY OVER BY, AGAINST WRONG-DOER.** — When a city charter makes it the duty of the owner of every lot in the city to keep the adjoining sidewalks in good repair, and empowers the superintendent of streets, in case of the owner's neglect after notice, to make repairs and collect the expenses thereof from the owner, the city cannot, in the absence of negligence on the part of the owner, recover from him the amount of a judgment recovered against it for damages sustained by one who was injured in consequence of a defect in the sidewalk adjoining such owner's premises: *Rochester v. Campbell*, 123 N. Y. 405; 20 Am. St. Rep. 760, and note; *City of Keokuk v. Independent Dist. of Keokuk*, 53 Iowa, 352; 36 Am. Rep. 226. The opposite view is held in the following cases: *Westfield v. Mayo*, 122 Mass. 100; 23 Am. Rep. 292; *Portland v. Richardson*, 54 Me. 46; 89 Am. Dec. 720, and note; *Lowell v. Spaulding*, 4 Cush. 277; 50 Am. Dec. 775, and note. See also *Brooklyn v. Brooklyn etc. R. R. Co.*, 47 N. Y. 475; 7 Am. Rep. 469.

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## WASHINGTON SAVINGS BANK v. BUTCHERS' AND DROVERS' BANK.

[107 MISSOURI, 123.]

**STOCKHOLDER'S LIABILITY ON UNPAID STOCK OF CORPORATION DOES NOT MATURE UNTIL CALL MADE.** — As between a corporation and its stockholder, the latter's liability on his unpaid stock does not mature until a call is made, and it is then that the statute begins to run. Where the officers of a corporation, whose affairs are in the hands of a court, have neglected to make the call, the court may make the call in the interest of the creditors, though the stockholders are not made parties to the suit, and the receiver or other officer of the court may collect the unpaid stock subscriptions by suits at law against the stockholders, and in such cases the cause of action does not accrue, nor the statute of limitations begin to run, until a call or some authorized demand is made.

**JUDGMENT CREDITOR MAY HAVE EXECUTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION, WHEN.** — Where an execution has been issued on a judgment against a corporation and returned unsatisfied, the judgment creditor may, under the Missouri statute, have execution against a stockholder to the extent of the unpaid balance of his stock. In such a case the cause of action does not accrue in favor of the creditor and against the stockholder until judgment is obtained and execution returned *nulla bona*, and the statute of limitations, for all the purposes of the proceeding, commences to run from that date.

**CALL FOR UNPAID STOCK SUBSCRIPTION NOT NECESSARY, WHEN.** — A call for unpaid stock subscription is not necessary, where the creditor takes out

execution therefor after judgment obtained and execution returned nulla bona, nor where the creditor brings his suit directly against the stockholder, under the section of the statute which gives him a direct action against a stockholder, in case of a dissolution of the corporation.

**CREDITORS' BILL MAINTAINABLE AGAINST STOCKHOLDERS WHO HAVE NOT PAID UP THEIR SUBSCRIPTIONS, WHEN.** — In equity a creditors' bill may be maintained by the creditors of a corporation against stockholders who have not paid up their stock subscriptions, notwithstanding the statute furnishes other remedies to the creditors; and in such a suit it is no defense that the stock is payable upon call of the board of directors, and that no call has been made.

**STATUTE OF LIMITATIONS APPLIES TO EQUITABLE AS WELL AS LEGAL CAUSES OF ACTION.** — The Missouri statute of limitations applies to equitable as well as legal causes of action.

**STATUTE OF LIMITATIONS, RUNNING OF, SUSPENDED WHEN.** — When the president of an insolvent bank, to whom the directors have for years before its suspension intrusted the entire management of its affairs, without authority from, but with the knowledge of, the directors, closes the bank, issues to the creditors scrip payable in three years, and secured by a mortgage on his own property, collects the bank assets and applies them to the payment of the scrip without objection on the part of the directors, the issuance of the scrip will suspend the running, during those three years, of the statute of limitations against the cause of action which the creditors had, at the time of the suspension of the bank, against the stockholders, for the amount of their unpaid subscriptions. The act of the president in procuring such extension of time without any act of the directors, though unusual, is binding upon the corporation and its stockholders.

**CORPORATION MAY RATIFY UNAUTHORIZED ACTS OF ITS AGENTS.** — A corporation may ratify the unauthorized acts of its agents without such ratification being evidenced by a vote or formal resolution of the board of directors, and when such unauthorized acts are clearly beneficial to the corporation, a presumption of ratification will arise from slight circumstances.

**CREDITOR'S bill.** The opinion states the case.

*James P. Maginn*, for the appellants.

*Hitchcock, Madill, and Finkelnburg*, for Walsh, executor, respondent.

*W. H. Clopton*, for respondent Maguire.

*M. L. Gray*, for the administrators of J. A. Wright, respondents.

**BLACK, J.** The Washington Savings Bank and Rudolph Kohn brought this suit, for themselves and all other creditors of the Butchers' and Drovers' Bank who should come in and contribute to the expenses of the suit, against the defendant bank, and some twenty or more stockholders therein, to recover balances due on unpaid stock. The circuit court gave judg-

ment for all of the defendants, on the ground that the cause of action was barred by the five years' statute of limitations, and hence did not consider the other questions presented by the pleadings and evidence. The facts will now be stated with a view only of disposing of this question.

The Butchers' and Drovers' Bank was a corporation organized under the laws of this state. It became insolvent and ceased to do a banking business on the 13th of July, 1877, owing at that time about seven hundred thousand dollars. The stock consisted of 2,610 shares of \$100 each, upon which there had been paid in cash and dividends fifty per cent, and no more. At the commencement of this suit, some of the stockholders had paid the balance due upon their stock, and the remaining resident solvent stockholders are made defendants.

Mr. B. M. Chambers was president of the bank for a period of ten years before its suspension, and during the last five years of that time the board of directors held but few meetings. In short, Mr. Chambers managed the business without aid from the directors. He got some of them together on the day the bank suspended. They opposed suspension, but the bank being insolvent, he closed the doors.

Mr. Chambers, as president of the bank, called a meeting of the creditors, and at that meeting he proposed to issue scrip for the outstanding debts, to mature in three years, that is to say, on the 1st of August, 1880, and to secure the same by a mortgage upon property owned by his wife and sisters, he to go on and close up the business of the bank. The proposition was accepted by nearly all the creditors. The scrip was issued in the name of and as obligations of the bank, and security given as proposed. The arrangement was made by Chambers, as president, without any action on the part of the directors. During the three years Chambers collected in the assets and paid off from four hundred thousand to five hundred thousand dollars of the scrip. Shortly after the expiration of that time, the remaining assets were levied upon under executions issued on judgments recovered on the unpaid scrip.

The plaintiff Kohn and one Kelcher were creditors of the Butchers' and Drovers' Bank when it closed, and they received scrip in payment of their debts, thus extending the time of payment for three years. They brought suit against the bank on this scrip in 1880. Kohn recovered judgment on the 22d

of December, 1880, for \$10,225, and another on the 7th of April, 1881, for \$6,230; and in December, 1880, Kelcher obtained judgment for \$15,880, which last judgment was assigned to the Washington Savings Bank, the other plaintiff in this case. Executions were issued, and were returned *nulla bona* the 6th of June, 1881. Proceedings were then prosecuted against some of the stockholders under section 736, Revised Statutes, 1879, by means of which the plaintiffs collected some sixteen thousand dollars. This suit was commenced on the 10th of October, 1884.

There is this provision in the bank articles of association: "The remainder of the stock so subscribed shall be paid upon calls and upon such terms as the board of directors herein-after mentioned may from time to time prescribe." No call was ever made by the directors.

To repeat, the important dates are: The bank closed July 13, 1877; three years' scrip issued August 1, 1877; plaintiffs sued the bank in 1880; judgments recovered December 21, 1880, and April 7, 1881; *nulla bona* return of executions, June 6, 1881; this action commenced, October 11, 1884.

The important question is, When did this cause of action accrue in favor of these plaintiffs and against the defendant stockholders?

The stockholders, by the terms of their subscriptions, agreed to pay the remainder of their stock at such time as it should be called for by the board of directors. As between the corporation and a stockholder, the liability of the latter on his unpaid stock does not mature until a call is made, and it is then that the statute of limitations begins to run. Where the officers of the corporation have neglected to make the call and the affairs of the corporation are in the hands of a court, the court may make the call in the interests of creditors, though the stockholders are not made parties to the suit. In such cases, the receiver or other officer of the court may collect the unpaid stock subscriptions by suits at law against the stockholders, and in such cases the cause of action does not accrue, nor the statute of limitations begin to run, until a call or some authorized demand is made: *Scovill v. Thayer*, 105 U. S. 143; *Glenn v. Semple*, 80 Ala. 159; 60 Am. Rep. 92; *Lehman v. Glenn*, 87 Ala. 618; *Glenn v. Williams*, 60 Md. 98; *Hawkins v. Glenn*, 131 U. S. 319; Wait on Insolvent Corporations, sec. 631.

Where, however, an execution has been issued on a judg-

ment against a corporation and returned unsatisfied, the judgment creditor may, under our statute, have execution against a stockholder to the extent of the amount of the unpaid balance on his stock: Rev. Stats. 1879, sec. 736. In such cases, the cause of action does not accrue in favor of the creditor and against the stockholder, until judgment is obtained, and execution returned *nulla bona*; and it must follow that the statute of limitations, for all the purposes of such a proceeding, commences to run from that date: Cook on Stock and Stockholders, 2d ed., sec. 225. In such cases, a call upon unpaid stock is not essential; nor is a call necessary when the creditor brings his suit directly against the stockholder under section 745. That section gives the creditor a direct action against a stockholder in case of dissolution of the corporation.

This suit is not, however, founded upon either of these statutes. It is simply a creditor's bill. It is not even a general winding-up bill. It is conceded on all hands that unpaid stock is a fund which the corporation holds for the payment of its debts, and the object of this suit is to satisfy these unpaid debts out of this fund, the only remaining one of the insolvent corporation. Such a proceeding may be maintained in equity, notwithstanding the statute furnishes other remedies to the creditors. In a suit like this, brought against the corporation and stockholders, it is no defense that the stock is payable upon call of the board of directors and that no call has been made. On this subject it was said in *Hatch v. Dana*, 101 U. S. 205: "And it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents. But in this case the company went out of business before the complainant obtained his judgment, and it does not appear that since that time it has had any officers who could make the call. . . . However this may be, it is well settled that a court of equity may enforce payment of stock subscriptions, though there have been no calls for them by the company"; citing *Henry v. Vermillion etc. R. R. Co.*, 17 Ohio, 187, where it is said: "When a company becoming insolvent, as in this case, abandons all action under its charter, the original mode of making calls upon stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand." "This," says the court in the *Hatch-Dana* case, "means, of course, as between the debtor and creditor of the corporation. After all, a company call is but a step in the process of collec-



tion, and a court of equity may pursue its own mode of collection so that no injustice is done to the debtor."

It must therefore be held that a call for the unpaid stock was unnecessary to the maintenance of this suit. Our statute of limitations applies to equitable as well as legal causes of action. With these results, it is insisted by the defendants that this suit could have been commenced on the 18th of July, 1877, when the bank ceased to do a regular business, and that the cause of action accrued at that date.

The debt held by one of the plaintiffs and that held by the assignor of the other were due when the bank suspended, but the time of payment was extended until the 1st of August, 1880, by the issuing and acceptance of the scrip. Until this scrip matured the plaintiffs had no cause of action, either against the bank or stockholders.

But the defendants insist that as this scrip was issued by the president without any action on the part of the directors, it does not have the effect to stop the running of the statute in favor of the stockholders.

As the corporation was insolvent, it was certainly within its proper corporate powers to make an assignment for the benefit of the creditors, or to make some arrangement with them whereby the assets could be collected and properly applied. This act of the president in procuring an extension of time was, therefore, one not out of, but clearly within, the corporate powers of the company. The objection must, therefore, resolve itself into this inquiry, whether the power to make the assignment had been conferred upon him as president. We are not advised what powers he had by force and operation of the by-laws, if any the corporation had. The undisputed evidence, however, is, that the directors intrusted to and devolved upon the president the entire management of the affairs of the bank. This state of things had existed for years prior to the suspension. "The authority of the subordinate agents of a corporation often depends upon the course of dealing which the company or its directors have sanctioned. It may be established, without reference to the official record of the proceedings of the board, by proof of the usages which the company has permitted to grow up in its business, and of the acquiescence of the board charged with the duty of supervising and controlling the company's business": 1 Morawetz on Private Corporations, 2d ed., sec. 509.

While the act of the president in procuring this extension of

time without any act on the part of the directors is an unusual exercise of power, still it must be remembered that the president was for all practical and business purposes the bank, and this, too, with the knowledge and approval of the directors. We have no hesitancy, therefore, in concluding that he had the authority to make the arrangement which he did make for an extension of time, and that it is binding alike upon the corporation and its stockholders.

Besides this, it is competent for a corporation to ratify the unauthorized acts of its agents, and the ratification need not be evidenced by a vote or formal resolution of the board of directors: *First Nat. Bank v. Fricke*, 75 Mo. 178. Here the bank for three years proceeded to settle up its affairs, collect and pay out from four hundred thousand to five hundred thousand dollars pursuant to the agreement made with the creditors, without a word of objection from the directors or stockholders, so far as we are informed. The arrangement was one highly beneficial to the bank; for it is manifest that thousands of dollars were saved and applied in discharge of debts, which, but for the agreement with the creditors, would have been consumed in fees and other expenses. Where an unauthorized act of an agent of a corporation is clearly beneficial to the corporation, a presumption of ratification will arise from slight circumstances: 2 Morawetz on Private Corporations, sec. 629. A more complete case of ratification could hardly be made out than that disclosed by the evidence in this case.

It must therefore be and is held that this scrip constituted valid obligations of the bank, and being valid as to the corporation, it is binding upon the stockholders. No distinction can be made between the liability of the bank on this scrip and the liability of the stockholders to pay up their stock subscriptions to discharge these obligations. As before said, this scrip did not mature until August, 1880, and until that time the plaintiff had no cause of action against the bank or stockholders. The cause of action did not accrue prior to that date, and as five years had not elapsed between that date and the commencement of this suit, the plea of the five-year statute of limitations must fail. As to this defense, it is unnecessary to say whether the statute began to run at that date, or when there had been a *nulla bona* return of the execution.

As some of the defendants, who are administrators, have pleaded the special two years' statute, it may be proper to say that, in our opinion, the cause of action did accrue, at least

when these executions were returned *nulla bona*; namely, the 6th of June, 1881. At that time the plaintiffs were in a condition to pursue the remedy pointed out by section 786 of the statutes. At that time the assets of the bank had been collected or sold out under executions, so that the corporation no longer existed for the purpose for which it was created, and it was a dissolved corporation for all the purposes of proceeding under section 745 of the statutes: *Moore v. Whitcomb*, 48 Mo. 543. The plea of the two-year statute is therefore well taken.

As stated at the outset, the circuit court simply ruled upon the question presented by the plea of the statute of limitations.

We therefore reverse the judgment, and remand the cause for further proceedings.

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**CORPORATIONS — CALLS FOR UNPAID SUBSCRIPTIONS — STATUTES OF LIMITATIONS.** — When, by the terms of subscription to the stock of a corporation, payments are to be made in installments, as called for by the corporation, the statute of limitations does not begin to run in favor of a subscriber until a call has been made: *Semple v. Glenn*, 91 Ala. 245; 24 Am. St. Rep. 894, and note; note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 827-829, in which the question as to the necessity for calls before the statute of limitations begins to run against creditors' claims is discussed.

**CORPORATIONS — JUDGMENT CREDITOR CAN HAVE EXECUTION AGAINST STOCKHOLDERS WHEN.** — Under the provisions of McClellan's Digest (Laws of Florida, sec. 40, p. 236), where no effects or property can be found belonging to a corporation with which to satisfy a judgment against it, the judgment creditor may, upon motion to the court, after notice, obtain execution directly against the share-holders, to the par value of the stock held by them without having them named individually as parties to the suit in which the judgment was obtained: *Gibbs v. Davis*, 27 Fla. 531.

**CORPORATIONS — CALLS FOR UNPAID SUBSCRIPTIONS, WHEN NOT NECESSARY.** — A suit in equity can be maintained by a creditor of a corporation against a subscriber to its capital stock to compel the payment of his unpaid subscription without attempting to procure a formal call to be made: *Thompson v. Reno Sav. Bank*, 19 Nev. 242; 3 Am. St. Rep. 833; note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 811, 812.

**CORPORATIONS. — CREDITORS' BILL** against stockholders who have not paid subscriptions: See note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 808, 811.

**LIMITATIONS OF ACTIONS — EFFECT IN EQUITY.** — Equity adopts the period of limitation fixed by statute in enforcing the rights of a ward against the surety on his guardian's bond, unless there is some equitable reason for adopting a different period: *Gillett v. Wiley*, 126 Ill. 310; 9 Am. St. Rep. 587, and note.

Ordinarily, courts of equity adopt the time fixed by the statute of limitations for barring claims at law in analogous cases as the period at the end of which they will conclude a recovery in equity: *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523, and note. In cases of fraud the statute of limitations in equity runs from the discovery of the fraud: *Peck v. Bank of America*, 16 R. I. 710.

**CORPORATIONS—RATIFICATION OF UNAUTHORIZED ACTS OF AGENTS.**—Where a mortgage is signed by its president and secretary without authorization by resolution, but the corporation receives the benefits of the mortgage, the defect in its original execution will be deemed cured by acquiescence and ratification: *Horton v. Long*, 2 Wash. 435; 26 Am. St. Rep. 867, and note. Where a corporation has had the benefit of a contract executed by its agent in disregard of a formality, slight evidence will establish ratification, and estop the corporation to deny its validity: *Sherman Center etc. Co. v. Morris*, 43 Kan. 282; 19 Am. St. Rep. 134, and note. To entitle the president to recover salaries paid to other persons employed by him in the service of the company, it must be shown that the services were known, ratified, and adopted by the directors, and such action may be inferred in the same manner: *Bagaley v. Pittsburg etc. Iron Co.*, 146 Pa. St. 478. One who assumes to act as agent for a prospective corporation does not bind it after organization, unless, with full knowledge of the facts, it accepts the benefits of his acts: *Buffington v. Bardon*, 80 Wis. 635. The acts of the directors of a corporation in violation of a by-law may be ratified by the share-holders, and such ratification may be presumed from long acquiescence in beneficial acts, with knowledge of the material facts: *Underhill v. Santa Barbara etc. Co.*, 93 Cal. 300.

## LONG v. KANSAS CITY STOCK-YARDS COMPANY.

[107 MISSOURI, 238.]

**VENDOR AND VENDEE—STATUTE OF LIMITATIONS RUNS IN FAVOR OF VENDEE IN POSSESSION AGAINST CLAIM OF DOWER OF VENDOR'S WIDOW.**—A vendee of land in possession under an executory contract does not hold adversely to the vendor, so long as the purchase-money remains unpaid, and the statute of limitations will not begin to run in his favor; but such possession of the vendee is adverse to a claim of dower in the land made by the vendor's widow, and the statute will run in his favor against such claim.

**EJECTMENT.** The opinion states the case.

*H. M. Meriwether*, for the appellant.

*Pratt, Ferry, and Hagerman*, for the respondent.

**GANTT, P. J.** The action is ejectment for lot 8 in block 5, and lots 10 and 11 in block 9, Skiles and Western's addition to Kansas City. The petition contains three counts, one for each lot. The answer admits the possession, but denies all other allegations. Plaintiff sues as husband of Juliette, formerly wife of Western.

It was admitted that Skiles and William W. Western, the latter formerly husband of the said Juliette, was the common source of title to the whole of Skiles and Western's addition. On June 21, 1869, W. W. Western and wife, Juliette, made to one J. F. Kinney a power of attorney authorizing him to sell

and convey all their interest in certain real estate, including the lots in controversy. The wife signed this power of attorney, and acknowledged it in the form required to relinquish her dower by deed in the lands of her husband. Under this power, on the 14th of September, 1869, said attorney sold lot 10, and in February, 1870, he sold lot 11, in block 9. A memorandum of these sales in writing was made and delivered to the purchasers. The name of the wife was not signed thereto by the attorney.

On the 8th of April, 1870, a contract was made in writing, signed by Skiles and Western, by William C. Kinney, selling lot 3 in block 5. In each of these sales a part only of the purchase price was paid. The purchasers under these contracts took immediate possession of the respective lots.

William W. Western died in July, 1870, leaving Juliette, his widow, and two children surviving him. In January, 1873, the two children of deceased, by their guardian, commenced a suit against the said widow and four other parties for the assignment of dower and partition of the lots in said addition, including those in suit. The court in this proceeding found the respective interests of the parties, and that the widow was entitled to dower in the interest to which the children were found to be entitled. It was ordered that partition be made among the parties according to their respective interests, and commissioners were appointed to make the partition. They filed their report, allotting to the widow, as her dower, the lots in suit, with others, the same also, with others, being allotted to the children. The report was duly approved. None of the purchasers of these lots from Western or their assignees were made parties to this suit. Plaintiff seeks to recover upon the life estate of his wife to these lots thus assigned to her as dower.

Suits for the specific performance of the contracts of sales by Western were commenced by the assignees thereunder in the years 1876, 1877, and 1879, respectively. The widow and heirs of Western were made defendants thereto, the prayer of the petition being that all the right, title, and estate of defendants be divested out of them and vested in plaintiffs. Decrees were rendered in these suits in accordance with the prayers of the petitions. Under these decrees defendant claims title.

This suit was commenced September 22, 1887, and was tried by the court without a jury. From instructions given and re-

fused, it is evident the court found and held that plaintiff's action was barred by the statute of limitation. If the court decided correctly on this defense, there will be no occasion to consider the other intricate questions argued before us.

The fact stands undisputed that the purchasers from Western went into possession of their respective lots under their contracts prior to the death of their vendor, which occurred in July, 1870, and continued in possession without interruption until the commencement of this suit. The only right plaintiff claimed was that of the dower of his wife, derived through the seisin of her former husband, William W. Western. If the statute of limitations commenced to run in favor of the vendees and against the dower right of the widow from the death of the husband, it is clear that the present action is barred, though, as between herself and the heirs, the assignment of dower in the partition case was conclusive. Plaintiff contends, that inasmuch as the possession of a vendee under a contract of sale is not hostile to the rights of the vendor or his heirs, so long as the relation of vendor and vendee is recognized, and inasmuch as the widow derives her right to dower through the seisin of the husband, it follows that the possession of these vendees was not adverse to the dower rights of the widow while it was held under the contracts. There is no doubt of the correctness of the proposition that a vendee in possession under an executory contract does not hold adversely to the vendor, so long as the purchase-money remains unpaid, and the statutes of limitation will not begin to run in his favor: *Adair v. Adair*, 78 Mo. 634; *Ridgeway v. Holliday*, 59 Mo. 452; *Mabary v. Dollarhide*, 98 Mo. 198; 14 Am. St. Rep. 639. Does it follow from this that such possession would not be adverse to the claim of dower by the widow of the vendor?

The ground upon which the vendee in such case is estopped to set up the bar of the statute against the vendor is based upon the fact that the possession is taken and held with the permission of the vendor, or subservient to his rights. The vendee is placed in possession by the vendor, and "holds as a licensee or tenant at will." As is said by this court in *Mabary v. Dollarhide*, 98 Mo. 202; 14 Am. St. Rep. 639: "The relation of a vendor and a vendee, when the vendee takes possession under an executory contract, for many purposes is likened to that of landlord and tenant": See Sedgwick and Wait on Trial of Title to Land, sec. 305.

The widow of the vendor or landlord does not stand in the

same relation to the vendee or tenant of the husband as does the heir. The privity existing between the heir and ancestor does not exist in respect to the relation between the husband and his widow. The statute accords to the wife an independence of the husband and a protection of her rights, even against the acts and deeds of the husband, which is not accorded to the heir: Rev. Stats. 1879, sec. 2197. "While, in a certain sense, she takes under the husband, in a larger sense she holds under the statute that exempts her rights from the prejudicial acts of the husband and the judicial proceedings of creditors and others": *Davis v. Green*, 102 Mo. 181.

Upon the death of the husband, the inchoate right of dower becomes absolute, and is independent of the title of the heir or alienee of the husband. Her right of action for the assignment of dower arises immediately upon the death of the husband, and may be against the heir himself, or any one who deforces her of it, and she is entitled to damages from the death of her husband: Rev. Stats. 1879, sec. 2206; *McClanahan v. Porter*, 10 Mo. 749. In the case of *Robinson v. Ware*, 94 Mo. 678, it is held that an action for the assignment of dower is an action for the recovery of real estate, and is limited by the statute governing such actions.

It is also the settled law in this state that the statute of limitation, applying to actions for the recovery of real estate, when the bar is complete, operates in the extinguishment of the title and right of the one against whom it runs, and not merely as a bar to the action: *Sherwood v. Baker*, 105 Mo. 472; 24 Am. St. Rep. 399; *Allen v. Mansfield*, 82 Mo. 693.

It follows that the undisputed continuous adverse possession of the lots in suit by the vendees of the husband and their assigns, prior to the commencement of this suit, was a complete extinguishment of any right of the widow, and a bar to any possessory action by her, whether founded upon a life estate or a mere unassigned dower.

The judgment, then, was for the right party, whatever may have been the effect of the partition as to the defendants, or of the decree in the specific performance suits as to the rights of the wife of plaintiff. Nor does it matter that he could not have recovered in this suit if her dower had never been assigned. If the bar of the statute was complete, she had no possessory rights which she could enforce in any form of action.

**Judgment affirmed.**

**DOWER — ADVERSE POSSESSION — STATUTE OF LIMITATIONS.** — A vendee in possession of land under a contract of purchase holds adversely to the vendor from the time of payment of the entire purchase-money: *Newsome v. Snow*, 91 Ala. 641; 24 Am. St. Rep. 934, and note. The possession of a widow, so long as her dower remains unassigned, is not adverse to one who purchases under a sale made by the administrator of her deceased husband: *Sherwood v. Baker*, 105 Mo. 472; 24 Am. St. Rep. 399, and note. A widow's right of action for dower in lands conveyed by the husband without her joining in the deed accrues at his death, and the statute of limitations commences to run against her from that date: *Winters v. De Turk*, 133 Pa. St. 359. The recovery of dower is barred by the statutory limitation in cases of actions of ejectment: *Beebe v. Lyle*, 73 Mich. 114.

## CUNNINGHAM v. ANDERSON.

[107 MISSOURI, 571.]

**ADMINISTRATION SALE, ORDER OF PUBLICATION NECESSARY TO VALIDITY OF.** — An order of publication is necessary to give a probate court jurisdiction to order a sale of land for the payment of debts.

**VOID ADMINISTRATION SALE IS NOT VALIDATED BY ORDER OF APPROVAL.** — An order approving an administration sale cannot by any retroactive effect impart validity to a void sale.

**PURCHASER AT VOID PROBATE SALE ENTITLED TO REIMBURSEMENT WHEN.** — A purchaser of land sold at an administration sale for the payment of debts, who fails to acquire a valid title because of a mistake in the description of the land, will have an equity to be reimbursed for the payment of the purchase-money, where it was applied to extinguish the decedent's debts, and also for taxes paid and improvements made by him in good faith.

**EJECTMENT.** The opinion states the case.

*Carleton and Roberts, and J. B. Dennis*, for the appellant.

*R. B. Oliver*, for the respondent.

**SHERWOOD, P. J.** This action of ejectment for lands in Pemiscot County grows out of two administration sales or attempted sales of such lands, the manner of making which and other attendant circumstances will hereinafter sufficiently appear.

The lands belonged to the estate of James R. Edsall. His widow, Charlotte, became the administratrix, and upon her application the land in controversy was duly ordered to be sold. Whether the order embraced other lands does not appear, and every step taken down to and inclusive of the order of sale being in conformity to law, and the land aforesaid correctly described, but in the notice of sale the land was misde-



scribed, — that is, the number of the section was given as section 13, instead of section 31. This order of sale, it seems, was made in 1876, and at the sale which occurred in the next year the land was cried according to such misdescription, and sold in that way, though it was mentioned, also, by the auctioneer at the sale as the "Mound farm," a name by which it was commonly known. Anderson, the defendant, bought the land at the sale, paid the price of his bid, four hundred dollars, and received a deed duly acknowledged before the probate judge; but this deed, as well as the report of sale, still kept up the misdescription aforesaid, by locating the land in section 13, instead of section 31. This sale was approved in open court, and such approval was entered on the minutes; but some days after court adjourned, and when entering the matter of record, the mistake was discovered, and an order made in vacation disapproving the sale, and a similar entry was made on the report, based upon the ground that the notice of sale did not comply with the order of the court, and signed by the probate judge; but this was after the deed was made and delivered and payment of the purchase-money, which money was applied in the payment of the debts of the deceased, Franklin Cunningham, one of the creditors, receiving, it seems, a portion of such disbursements. Anderson entered upon the lands purchased, and has remained there ever since, making valuable improvements by clearing and fencing lands, paying taxes, etc.

Mrs. Edsall made final settlement and resigned her administration, and there still remaining debts unpaid, said Franklin Cunningham was appointed administrator *de bonis non*. This was in 1879 or 1880. On being qualified, he presented his petition for the sale of all of the lands for the payment of debts, and notice was duly given under order of the court for the sale of all of the lands of the estate for the payment of debts; but when the court came to make the order of sale, the land in controversy was excluded from such order, and the lands embraced in the order were sold by Cunningham. A year or so afterwards Cunningham again applied by original petition for the sale of the land in controversy; but the probate court refused to make such order, on two grounds: 1. Because there had been no order of publication made; and 2. Because the records showed the land had already been sold, and payment made therefor, etc.

About a year after this application was denied, from which

no appeal was taken, Cunningham made another similar application for the sale of the land in litigation, but this application was denied on similar grounds; but on appeal taken to the circuit court the judgment of the probate court was reversed, and that court ordered to make an order of sale, which it did, but without any order of publication, and thereupon the land was sold and deed made to the plaintiff, the purchaser. Aside from the point of lack of order of publication, the proceedings resulting in the last sale were legal. In 1882 the records of the probate court were destroyed by fire, and the last sale took place in 1883, and the report of the sale being approved, Cunningham made a deed to plaintiff in 1885.

1. Though the order of publication made in 1879 on the application of Cunningham was sufficiently comprehensive to embrace all the lands owned by the deceased at his death, yet the probate court refused to order the sale of the land in controversy, and the power and jurisdiction of the probate court was exhausted and spent its force in making the order of sale which followed the order of publication. Under the terms of section 149, Revised Statutes, 1879, it was within the judicial discretion of the court to "make an order for the sale of such real estate, or any part thereof"; but it declined to make an order sufficiently comprehensive to embrace the land in suit. When all parties in interest are notified by publication to appear and show cause, etc., and they do appear in obedience to such notification, and the probate court makes an order of sale directing that only a portion of the land of the estate be sold, they may well presume that this land thus ordered to be sold will be sufficient for the payment of debts; or if not sufficient, that additional notice will be given, and this the law requires: 2 Woerner on Administration, 1049-1052; *Ackley v. Dygert*, 33 Barb. 176.

2. If the order of sale in the present instance had been as comprehensive as the order of publication, a very different question would be presented, — one not necessary to be now considered.

As no order of publication was made, the probate court acquired no jurisdiction to order a sale of the land in suit; and this conclusion is not at all affected in consequence of the judgment of the circuit court directing that an order of sale be made. It was beyond the power of the circuit court to make such an order; and by that mere order no jurisdiction could be conferred where none existed before. Upon this branch of

this cause, and for the reasons given, we hold that no title was conveyed to plaintiff by reason of the sale made by the administrator *de bonis non*.

3. It is claimed by plaintiff, that notwithstanding the facts aforesaid, the order approving the sale made by the administrator *de bonis non* cured any previously occurring defective proceedings, if any there were. This is a misapprehension. While perhaps an order of approval may cure certain irregularities, it cannot by any retroactive effect impart validity to a void sale: *Farrar v. Dean*, 24 Mo. 16.

4. Again, even if it be true that the defendant gained no title, either legal or equitable, by his purchase, owing to the misdescription of the land, yet he undoubtedly acquired a clear equity to be reimbursed for his payment of the purchase-money which went in extinguishment of the debts of the estate, and for taxes paid, and improvements made, if made in good faith, and until thus reimbursed the plaintiff in any event should not in equity and good conscience be permitted to recover the land in suit, even if he had acquired the legal title: *Schafer v. Causey*, 76 Mo. 365, and cases cited; 2 Woerner on Administration, 1080, 1081.

But it has been held that if the misdescription were merely such as not to mislead purchasers, this would not prevent the passing of the legal title: 2 Woerner on Administration, 1052, 1053. It is unnecessary, however, to rule these points definitely at the present time, as the defendant is not appealing.

The conclusion from the premises is, that the judgment be affirmed.

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**EXECUTORS AND ADMINISTRATORS — ADMINISTRATOR'S SALE WITHOUT NOTICE — VALIDITY OF.** — An administrator's sale ordered and confirmed without notice to the heirs is void: *Doe v. Bowen*, 8 Ind. 197; 65 Am. Dec. 753, and note; *Valle v. Fleming*, 19 Mo. 454; 61 Am. Dec. 566, and note; note to *Reynolds v. Wilson*, 60 Am. Dec. 755.

The failure of the executors to give notice of a sale as prescribed by the statute does not render the sale void: *Bland v. Muncaster*, 24 Miss. 62; 57 Am. Dec. 162, and note.

**EXECUTORS AND ADMINISTRATORS — EFFECT OF CONFIRMATION OF VOID SALE BY.** — A void sale of the lands of a decedent cannot be validated by a confirmation of the commissioner's report: *Bethel v. Bethel*, 6 Bush, 65; 99 Am. Dec. 655, and note. A void administrator's sale may be attacked collaterally, notwithstanding its confirmation by a probate court: *Townsend v. Tallant*, 33 Cal. 45; 91 Am. Dec. 617, and note. A private sale of land of a decedent by his administrator upon order of a probate court for the payment of the debts

of the decedent is not void when confirmed: *Apel v. Kelsey*, 52 Ark. 341; 20 Am. St. Rep. 183; see *Rea v. McEachron*, 13 Wend. 466; 28 Am. Dec. 471.

**EXECUTORS AND ADMINISTRATORS—VOID SALE—RIGHTS OF PURCHASERS.**—A purchaser at a probate sale, which is founded upon a petition which does not contain the averments necessary to give the court jurisdiction, acquires no legal title which he can convey; but he may acquire an equity enforceable against the heirs who have received the purchase-money: *Wilson v. Holt*, 83 Ala. 528; 3 Am. St. Rep. 768. Where an executor holds in his hands money derived from a sale of the lands of his testator which is disaffirmed, the purchaser at such sale is entitled to a decree against him for the amount so held: *Hudgin v. Hudgin*, 6 Gratt. 320; 52 Am. Dec. 124; extended note to *Scott v. Dunn*, 30 Am. Dec. 177.

## NAVE v. ADAMS.

[107 MISSOURI, 414.]

**JUDGMENT CONCLUSIVE AS ADJUDICATION, THOUGH PARTIES NOT IDENTICAL.**

—A judgment is conclusive of the issues involved in a controversy as between the parties and those standing in privity with them, although in the action in which it is pleaded some only of the parties are litigants.

**DECREE CONCLUSIVE AS TO EXTINGUISHMENT OF LIEN OF DEED OF TRUST, WHEN.**—Where, in a former suit in which an issue was raised as to the validity of a deed of trust as a lien on certain land, the decree rendered ascertained and adjudged the several specific interests of the parties in such a manner as to, in effect, eliminate the lien of the deed of trust, as between the parties, the decree is conclusive as to the extinguishment of the lien.

**JUDGMENT CONCLUSIVE BETWEEN PARTIES ON SAME SIDE OF CAUSE.**—A judgment is conclusive as to issues raised and determined between parties on the same side of the cause.

**JUDGMENT EFFECTIVE AS ADJUDICATION AGAINST MARRIED WOMAN, WHEN.**—As to her separate property, a valid judgment against a married woman is as effective as an adjudication as though she were sole.

**SUPPLEMENTAL PLEADING MAY INTRODUCE FACTS THAT HAVE TRANSPIRED SINCE SUIT COMMENCED.**—A party to a suit may by supplemental pleading bring forward facts that have transpired since the institution of the suit, which may tend to strengthen or reinforce the cause of action or defense stated in the pleadings before the court.

**ERROR WITHOUT PREJUDICE WILL BE DISREGARDED ON APPEAL.**

SUIT begun in 1877, by Milton J. Bundy, to enjoin the enforcement of a deed of trust executed by him to certain land, purporting to secure the sum of five thousand dollars and interest. The defendants are Mary A. Adams, the owner of the claim secured, her husband, and the trustee in the deed of trust. The plaintiffs now are the heirs at law of the original plaintiff, Milton J. Bundy, who died during the proceedings. The case is a sequel to *West v. Bundy*, 78 Mo. 407. The effect

of the judgment rendered in the circuit court, after the appellate decision, forms the chief ground of controversy now. The present suit was begun a few days before *West v. Bundy*, 78 Mo. 407, but was continued from time to time until the determination of that case. The pleadings were then amended, and the judgment in *West v. Bundy*, 78 Mo. 407, was introduced as a controlling fact to sustain the application for a perpetual injunction against the deed of trust first mentioned. The judgment in *West v. Bundy*, 78 Mo. 407, contained, among other things, the following: "The court doth further adjudge and decree that the said former decree of this court vesting the title to all of said lands aforesaid in said Milton J. Bundy, so far as the said interest in said lands inherited as aforesaid from said Marion Bundy, be and the same is hereby set aside and held for naught; and it is adjudged and decreed by the court that the legal and equitable right, title in and to said lands aforesaid, inherited by plaintiffs as aforesaid, vest and is hereby adjudged in the said plaintiffs herein according to their respective rights and interests as herein set forth and declared; and it is further adjudged and decreed by the court from the pleadings and the evidence that the said Mary A. Adams, widow of said James A. Bundy, deceased, is not entitled to dower interest in said lands, or in any part thereof. It is further adjudged and decreed by the court that said Milton J. Bundy is the owner and entitled to the one undivided half of the whole of said lands under and by virtue of the said gift aforesaid, and that the said Milton J. Bundy is further entitled to the one-fourth part of the other one undivided half of said lands inherited from his brother, said Marion Bundy, and his said sister, Angeline Gordon; that the said Mary A. Adams is entitled to the one-fourth part of the undivided half of said lands aforesaid, being that part inherited by her husband, said James A. Bundy, from his son, said Marion Bundy, and his daughter, Angeline Gordon, and devised to her by his last will and testament; that the said Albert West, grandchild as aforesaid, is entitled to the one-fourth part of the undivided half of said lands aforesaid, inherited from the said Marion Bundy and Angeline Gordon; that said Emma J. Patterson, William Reynolds, and Minnie Reynolds, grandchildren as aforesaid, are entitled to the one fourth of the undivided one half of the said lands aforesaid jointly inherited from the said Marion Bundy and Angeline Gordon, It is further adjudged that plaintiffs have and recover from

defendants herein their costs laid out and expended," etc. The trial court held that the foregoing judgment was conclusive of the rights of the parties in this suit, and found for the plaintiffs, and the defendants appealed. The other facts are stated in the opinion.

*B. R. Vineyard and J. R. McKenzie*, for the appellants.

*William Heren and Frank Knickerbocker*, for the respondents.

BARCLAY, J. The facts of this controversy are numerous, complicated, and spread over a considerable period of time; but a close scrutiny of them shows that the exact points of present difference lie within a quite narrow field.

In the opinion of this court in *West v. Bundy*, 78 Mo. 407, the history of the litigation prior thereto is fully given. When that cause again reached the trial court a final decree was entered, which purported to determine accurately the precise interest of each party to that suit. Mr. and Mrs. Adams, defendants in the present case (who were also defendants in that), had in their answer in *West v. Bundy*, 78 Mo. 407, set up the deed of trust now in controversy as a then subsisting lien upon the realty, recited the particulars of its execution (as part of a settlement or compromise of differences between James A. Bundy and Milton J. Bundy), and after alleging its transfer to Mrs. Adams, asserted that Milton J. Bundy was possessed of no other property in Missouri out of which the secured debt could be made, except the land which formed the subject of the suit.

These facts were put in issue by the reply in that case, and the judgment, predicated upon these pleadings, followed.

In the statement accompanying this opinion are copied the passages from that final judgment, dealing directly with the earlier compromise decree, which formed (in part) the consideration for the deed of trust here sought to be annulled.

At the hearing of the suit now before us, the plaintiffs relied upon the effect of that judgment as an adjudication upon the validity of the deed of trust. The trial court held that its effect was to render that supposed security invalid and inoperative, and hence perpetually enjoined its enforcement. In so ruling we think the learned circuit judge was right.

It is not necessary to the effectiveness of a former judgment as a conclusive adjudication of a given controversy that the parties to both are identically the same. Others than those

now before the court were parties to the suit of *West v. Bundy*, 78 Mo. 407, but Milton J. Bundy and Mr. and Mrs. Adams were among the parties in that case. The last-named two, as defendants, by answer therein, brought into that suit the consideration of this very deed of trust, and endeavored to establish it as a lien in favor of Mrs. Adams; but, despite that effort the court adjudged that Milton J. Bundy was entitled to such an interest in the land as obviously excluded the further existence or vitality of the alleged encumbrance sought to be asserted by the Adamses. Moreover, the ascertainment in that decree of the particularly defined interest and estate of Mrs. Adams, in face of the claim, in her answer, for a larger interest (which the recognition of the deed of trust as a valid charge would have secured), emphasized the effect of the finding as to Milton J. Bundy, with regard to that encumbrance. The finding and decree as to the specific interests and estates of the several parties, in and to the realty which formed the subject-matter of all this litigation, in view of the issues made by the pleadings in that suit, necessarily cut out, and in effect eliminated, the lien or charge originally created by the deed of trust of Milton J. Bundy, as between the parties to that decree, and those standing in privity with them: *Moore v. Moore*, Ky., Sept. 1890, 14 S. W. Rep. 339; *Bobb v. Graham* (1886), 89 Mo. 200.

This conclusion is not affected by the consideration that Mrs. Adams and Milton J. Bundy were both defendants in *West v. Bundy*, 78 Mo. 407. Their interests were essentially adverse to each other, and the adjudication respecting them, upon the pleadings clearly raising such an issue, is as conclusive as though they had occupied the more formal positions of plaintiff and defendant as to that issue: *Leavitt v. Wolcott* (1884), 95 N. Y. 212; *Goldschmidt v. Nobles Co.* (1887), 37 Minn. 49; *Devin v. Ottumwa* (1880), 53 Iowa, 461.

The estate of Mrs. Adams in the land in question, whatever its extent, was separate and sole in character. No question, therefore, arises by reason of the marital relation touching the proper application of the principles above mentioned. As to her separate property, a valid judgment against a married woman is as effective as an adjudication as though she were sole.

2. Nor does the circumstance that the last decree in *West v. Bundy*, 78 Mo. 407, was reached after the bringing of this suit, and was introduced as a fact herein by amendment of the

original petition, impair in any wise the force of that decree as an adjudication of the matters involved therein.

It is permissible in such a proceeding as this to bring forward, upon proper leave and terms, by supplemental or amended petition, facts that have transpired since the institution of the suit, which may tend to strengthen or reinforce the cause of action or defense stated in the pleadings before the court: Rev. Stats. 1889, sec. 2104; *Childs v. Kansas City etc. Co.*, Mo., Nov. 9, 1891.

3. The trustee in the deed of trust was not a party to *West v. Bundy*, 78 Mo. 407; but as his power to sell could only be lawfully set in motion by the present beneficiary, Mrs. Adams, who is now powerless to move in that direction by force of the decrees in that cause and this, it is immaterial whether or not he was properly embraced within the prohibition of the injunction here. If there was any error in so including him, as to which we make no ruling, it was without prejudice to the substantial rights of any one, in view of the position he occupies in the case, and of the stipulation of the parties in the trial court that no costs should, in any event, be adjudged or taxed herein against him.

On the whole record, we conclude that the judgment of the circuit court should be affirmed, and it is so ordered.

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JUDGMENT — RES JUDICATA — WHAT PARTIES CONCLUDED: See notes to *Sauls v. Freeman*, 12 Am. St. Rep. 199; *Hill v. Bain*, 2 Am. St. Rep. 876-878.

JUDGMENT — CONCLUSIVENESS OF, BETWEEN PARTIES ON SAME SIDE OF CAUSE. — Whatever is adjudicated between defendants has the same effect between them as *res judicata* as if they had appeared in the action as plaintiff and defendant: *Parkhurst v. Berdell*, 110 N. Y. 386; 6 Am. St. Rep. 384, and note. A judgment in favor of one defendant against a plaintiff determines nothing between the defendant and a co-defendant: *Ostrander v. Hart*, 130 N. Y. 406; see *Dickens v. Long*, 109 N. C. 165. A question between co-defendants is not determined by a judgment between the plaintiff and one of them: *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379 and note.

JUDGMENT — WHEN CONCLUSIVE AGAINST MARRIED WOMEN: See note to *Haines v. Flinn*, 18 Am. St. Rep. 790. A judgment confessed by a married woman, regular on its face, her coverture not appearing, cannot be questioned on distribution by a stranger to it because the record does not exhibit facts showing that it was authorized by the act of 1887: *Koechling v. Henkel*, 144 Pa. St. 215. Plaintiffs in ejectment can take no rights under the children of a decedent as to land adjudged in a former suit to be the separate property of the wife of the decedent: *Gage v. Downey*, 94 Cal. 241. A judgment against a married woman reversed cannot operate as *res judicata* because it is a nullity: *Taylor v. Von Schraeder*, 107 Mo. 206.



## RICHARDSON v. DE GIVERVILLE.

[107 MISSOURI, 422.]

**MARRIED WOMAN'S CONTRACT FOR SALE OF REAL PROPERTY NOT HER SEPARATE ESTATE, NOT VALID.** — A married woman can convey her real property which is not her separate estate only by a deed jointly executed by herself and husband; and her contract for the sale of it, executed by herself alone, is invalid both at law and in equity.

**SEPARATE ESTATE OF MARRIED WOMAN MAY BE CONVEYED BY HERSELF ALONE.** — Real estate held by a married woman to her sole and separate use, free from the control of her husband, is her separate estate in equity, and she can convey it by her deed without her husband joining therein, and a contract made by her for the sale of it may be specifically enforced by a court of equity.

**ANTENUPTIAL CONTRACT DOES NOT SECURE TO WIFE SEPARATE ESTATE IN HER REAL ESTATE, WHEN.** — An antenuptial contract made in France, excluding from the community property then owned by the parties, and providing that on the wife's death the husband should have, during his life, the whole of the income arising from all the property then owned by her, or in case of children of the marriage living, half of such income, but not containing any agreement that her real estate should remain her sole estate free from the control of her husband, does not secure to the wife a separate estate in her real estate owned by her in Missouri at the time of the marriage, because it does not show a clear intent to exclude the common-law marital rights of the husband.

**INTERVENTION OF TRUSTEE NOT NECESSARY TO CREATION OF SEPARATE ESTATE OF MARRIED WOMAN.** — The intervention of a trustee is not necessary to the creation of a married woman's separate estate.

**SEPARATE ESTATE OF MARRIED WOMAN, WHAT NECESSARY TO CREATION OF.** — No special or technical words are necessary to the creation of a married woman's separate estate, but the intention to exclude the husband's common-law marital rights must be clearly expressed.

**CONTRACTS, ACCORDING TO WHAT LAW CONSTRUED.** — The law of the *situs* conclusively governs as to all questions relating to rights, titles, and interests in and to real estate, but a contract concerning personalty is usually construed according to the laws of the country with reference to which it was made. In so far, therefore, as an antenuptial contract made in France relates to personalty, it will be construed according to the law of France, but so far as it relates to real estate owned in Missouri at the time of the making of the contract, it will be construed by the law of Missouri.

**SUIT for specific performance.** The opinion states the case *Reynolds and Lewis, and L. F. Parker*, for the appellant.

*Boyle, Adams, and McKeighan*, for the respondents.

BLACK, J. Plaintiff Richardson brought this suit against Madam De Giverville and her husband to enforce the specific performance of a written contract executed by her, while a married woman, by Mr. Bailey, her agent, for the sale of fifty acres of land in the limits of St. Louis to the plaintiff. The

petition states that Madam De Giverville owned and held the property as her sole and separate estate. The defendants deny this averment, and say she was seised of and held the property as her general estate, subject to the marital rights of her husband, and for this reason the contract is invalid. They aver that the contract, which had been recorded, constitutes a cloud upon their title, and ask that it be set aside and canceled. The circuit court found the issues for the defendants, dismissed the plaintiff's petition, and gave judgment as prayed for in the answer.

The following are the essential facts, stated in the order of time in which they occurred: James W. Kingsbury, by his will, which was probated in St. Louis in 1853, devised the land in suit and other lands to his son and two daughters. One of these daughters, who is the real defendant in this case, and her co-defendant, Armand Francois Robert, Count of Giverville, married in France in 1865. Preparatory thereto they executed a marriage contract. If Madam De Giverville has a separate estate in the property in question, she has it by force and effect of this antenuptial contract.

The contract was executed in France before a notary public, bears date October 25, 1865, is signed by the parties, but not under their seals. Omitting formal and immaterial parts, it is as follows:—

“Art. 1. The future conjoints adopt the community of goods as the basis of their civil marriage, such as is established by the Code Napoleon; they covenant, however, that this community shall be limited to the acquisitions of real and personal estate which they may make during their marriage; accordingly, the same community from which is excluded all the present estate of the future conjoints, and that which may fall to them in their own right in the future, shall be governed (except what shall be hereafter stipulated) by the dispositions of the articles 1498 and 1499 of the Code Napoleon.

“Art. 2. Each conjoint shall be entitled to one half or moiety of the benefits of the community of acquisitions above mentioned. It is, however, stipulated as it is allowed by the article 1525 of the Code Napoleon, that the surviving conjoint shall be entitled to the usufruct, during his lifetime, of the portion of the real and personal estate which shall come to the conjoint first dying in the community; *provided, however*, that there shall be no living children of said intended marriage; for otherwise the surviving conjoint shall be entitled

to the usufruct only of one half of that portion. To enjoy the usufruct which shall come to him in either of the said events, the surviving conjoint shall not be obliged either to give security or to invest the money coming from or give adequate substitute for the personal estate, but he shall cause an inventory thereof to be made."

By the third and fourth articles the parties make a general declaration of the property, real and personal, which they each bring to the marriage, with a value fixed upon the personal property.

"Art. 5. At the dissolution of the marriage or of the community of acquisitions, each one of the conjoints shall retake what belongs to him or her in his or her own right, as he or she is entitled to. It is covenanted, however, that each of them or their heirs shall retake personal property of the same nature and kind as that brought in the community by each of them, according to the appraisement thereof, and to an amount equal to the sum they shall be entitled to deduct from the community.

"Art. 6, and last one. Lastly, the future conjoints mutually grant and make over to each of them, as a gift, and to the benefit of the survivor of them (which gift they respectively accept), the usufruct, during the life of said survivor, of all the personal and real estate, without exception, which the one first dying shall have at the time of his death, and which shall come from his succession. In case there shall be any living children or child of the intended marriage, this gift shall be limited to the usufruct of one half or moiety of the same real and personal estate. To enjoy the usufruct which shall come to him in either of the said events, the survivor shall not be obliged either to give security or to invest the money coming from, or give adequate substitute for, the personal property, but he shall cause an inventory thereof to be made. This donation shall not prejudice in any manner the convention stipulated in article second concerning the property coming from acquisitions."

Count and Madam De Giverville came to the United States in 1872, and have resided in St. Louis since that time. She acquired the property in question in severalty by virtue of a partition deed executed in 1874 by her and her sister and their husbands, the brother having died before that date.

While the count was in France on a visit, his wife placed the property in suit in the hands of Mr. Bailey, a real estate

agent, for sale; and he sold the same to the plaintiff at three hundred dollars per acre. Bailey at the time, as the agent of Madam De Giverville, and not as the agent of her husband, gave the plaintiff a writing, dated June 27, 1885, in the form of a receipt, acknowledging the payment of one hundred dollars, as part of the purchase price, and stating the terms of the sale. This is the contract which the plaintiff seeks to enforce by this suit. It appears Judge Gantt held a power of attorney to transact business for Count De Giverville, but there was doubt as to whether it gave him authority to execute a deed; hence the transaction stood unclosed until Count De Giverville returned, which was less than a month after the date of the contract. He declined to join his wife in a deed to the plaintiff, insisting that the property was worth four hundred dollars per acre. Subsequently, and in April, 1886, Bailey acknowledged the execution of the contract before a notary public, and the plaintiff then caused the same to be recorded in the records of land titles. The abstract of title procured by the plaintiff, at the time he purchased the property through Bailey, did not disclose the marriage contract. The abstractor overlooked it, though it had been duly recorded in St. Louis. About a year and a half after the date of the contract of sale, the plaintiff for the first time discovered and received actual notice of the existence of the marriage contract, and within four or five months thereafter he commenced this suit. In the mean time the property had increased in value, so that when this suit was commenced it had a market value of more than twice that specified in the contract upon which this suit is founded.

1. If Madam De Giverville was seised of and held this property as her general estate, then she could only convey it by a deed jointly executed by herself and husband, and her contract for the sale of it is invalid, both at law and in equity. If, however, she held the property to her sole and separate use free from the control of her husband, then it was her separate estate in equity; and she could convey it by her deed without her husband joining therein, and a contract made by her for the sale of it may be specifically enforced by a court of equity. Assuming for the present that the antenuptial contract was executed in due form, the question arises whether it secured to her a separate estate in the property in question. The plaintiff must sustain the affirmation of this question before he has any standing to enforce the contract.

By the first article of the contract the parties adopt the community of goods as established by the Code Napoleon; but they in express terms limit this community of property to acquisitions made during the marriage. From this community they, in emphatic terms, excluded the property then held by each of them. The real estate now in question and then owned by Miss Kingsbury did not enter into or constitute any part of the community property. Articles 2 and 5 relate alone to community property, and articles 3 and 4 are simply declarations of property held by each at the marriage, and were proper provisions to prevent the movables from falling into the community property. It is an interesting inquiry to follow out the incidents attached to this community or partnership, but such an inquiry can subserve no purpose in this case; for the real estate in question was, by the contract, excluded therefrom.

The only articles of the contract which have any direct bearing upon this question at issue are the first and sixth. The first, as has been said, excludes the property then owned by the parties from the community, and hence excludes from the community the real property now in question. By the sixth article the parties made over, each to the survivor, the usufruct, during the life of the survivor, of all real and personal property which the one first dying shall have at the time of his or her death and of that which shall come to him or her by succession; the survivor to enjoy the usufruct during life without being obliged to give security for the principal of the personal property; the usufruct to be limited to one half in case there be any living children at such death. The substance, then, of this entire agreement, so far as it relates to this Missouri real estate, is this: It is not community property. Should the wife die first, then the husband is entitled to the income thereof during his life, subject to the provision concerning children. There is no agreement whatever as to the right of the husband in or to this property of the wife during the existence of the marriage. His rights during that time are left to the law for determination; and the law which determines his rights during the marriage is the law of Missouri, and not the Code Napoleon. The contract then resolves itself into this: the parties make no agreement that the real estate belonging to the wife shall remain her sole estate, free from the contract of her husband; but they do agree that at her death he shall, during his life, have the whole or the

half of the income arising therefrom, according as there may or may not be children living of the marriage. Does such an agreement secure to the wife a separate estate, as understood by our laws? This question must be answered by ascertaining what words are sufficient to create such an estate.

It is now well settled that the intervention of a trustee is not necessary to the creation of a separate estate: *Schafroth v. Ambs*, 46 Mo. 114. Such an estate may be secured to the wife by a marriage settlement: 2 Story's Eq. Jur, sec. 1382. The words generally used are "to her sole and separate use"; but as said in *Boal v. Morgner*, 46 Mo. 48: "No special or technical words are required, but any provision that negatives or excludes the marital rights of the husband, while giving the property to the use of the wife, should be held to create in her a separate estate. Though the words 'separate use' or 'sole use' are usually employed, yet if the same intention is clearly expressed by other terms or provisions of the instrument, such words are not necessary." See also *Clark v. Maguire*, 16 Mo. 302; *Metropolitan Bank v. Taylor*, 53 Mo. 444; *Boatmen's Savings Bank v. Collins*, 75 Mo. 280. Any words which negative or exclude the marital rights of the husband will be sufficient. On the other hand, the marital rights of the husband to the property of his wife will not be excluded by mere conjectures. The intent to exclude his common-law rights must be clearly expressed. A necessary implication will be sufficient; but the purpose to create a separate estate must clearly appear: *Harte v. Leite*, 104 Mo. 315. In the case last mentioned, the testator devised and bequeathed to each of his two daughters "one fifth of my estate, real and personal, in their own rights," and we held the will did not create a separate estate. The purpose to create a separate estate must clearly appear beyond a reasonable doubt; otherwise the husband will retain his ordinary legal and marital rights over the property: 2 Story's Eq. Jur., sec. 1381.

Applying these rules to the marriage contract in question, it cannot be said that it creates in the wife a separate estate. The only thing from which such an inference can be drawn is the fact that the husband is given the income arising from the property during his life after her death. It may be conjectured that by this provision the parties designed to exclude any interference or control on his part during the existence of the marriage relation; but it is a mere conjecture. There is certainly no expressed intention to exclude his common-law

marital rights, or to create a separate estate in her, nor is such an intention necessarily implied. It must, therefore, be held that Madam De Giverville had no separate estate in the property in question.

2. But it is urged, as against the conclusion just stated, that we must construe this agreement in the light of the French laws, not, it is said, for the purpose of enforcing these laws here, but for the purpose of ascertaining the real intention of the parties, and of then giving force and effect to that intention. There can be no doubt but this agreement was entered into in France with reference to the Code Napoleon, and so far as it relates to movable property, or, as we would say, personal property, the same effect would be given to it here that would be given to it by the tribunals of France: *Crosby v. Berger*, 8 Edw. Ch. 538. There are, of course, exceptions to this rule, as where the contract violates good morals, or is against public policy, or is repugnant to our laws.

In *Le Breton v. Miles*, 8 Paige, 261, natives of France, resident in this country, made a marriage contract with reference to the French law of community. They intended to return to that country, and so stated in the agreement, but did not do so. It was held that the contract should be construed and enforced according to the laws of France, with reference to which it was made, the property in question being personal property. But it must be remembered that we are now dealing with real estate owned by Miss Kingsbury at the date of the marriage contract. The law is well settled that a title to or interest in lands must be acquired according to the law of the place where the lands are situated. It is that law which determines the force and effect of the instrument, be it a deed, will, or contract: *Keith v. Keith*, 97 Mo. 224. So, too, where the deed or other instrument relates to immovables, or what the common law calls real property, it must be construed according to the law of the place where the property is situated, or the *lex loci rei sitæ*: 2 Parsons on Contracts, 5th ed., 571.

The common law, says Story, declares that the law of the situs shall exclusively govern in regard to all rights, interests, and titles in and to immovable property: Story on Conflict of Laws, secs. 428, 463. It follows from what has been said that so far as concerns the real property situated in this state, and owned by Miss Kingsbury at the date of the antenuptial contract, we must take the contract as it is expressed on its face, and construe and apply it according to the laws of this state.

As respects this property, we have nothing to do with the French law. As to this real estate, the parties are to be deemed as having contracted in reference to the laws of this state.

3. But if we could incorporate the Code Napoleon into this contract and use it as evidence of the intention of the parties, still Madam De Giverville would not have a separate estate in this property, as that estate is known to our law. This, we think, must appear by bringing together several articles of that code. This we now do by stating the substance of some of them, and by giving others in the language of the translation before us.

The law, says the French code, does not regulate the conjugal association as respects property, except in default of special agreement: Art. 1387. Community is established by the simple declaration of the parties that they marry under the law of community, and it is the law in the absence of any contract: Art. 1400. The community thus established seems to embrace all property of the parties, except immovables owned at the marriage or thereafter acquired by succession: Arts. 1401, 1404. The community may be modified in many ways by special marriage agreement. Among others, the parties may stipulate for a community of acquisitions only, as was done in the case now in hand, and then they are deemed to exclude from the community the debts of each, existing and future, and movables, present and future: Art. 1498. Parties may, without submitting the conditions of dower, declare that they marry without community, or that they will be separate in property: Art. 1529. "The article importing that the parties marry without community does not confer upon the wife a right to administer her property, nor to enjoy the fruits thereof; such fruits are deemed to have been given to the husband to sustain the expense of marriage": Art. 1530. "When the parties have stipulated by their marriage contract that they will be separate in goods, the wife retains the entire management of her property, movable and immovable, and the free enjoyment of her revenues": Art. 1536. "In no case, nor by virtue of any stipulation, can the wife alienate her immovables without the special consent of her husband, or upon his refusal, without being authorized by the court": Art. 1538.

There is, it will be seen, a manifest difference between those cases where the parties marry without community, and where by marriage contract they agree to be separate in goods. In the former case the wife does not enjoy the fruits of her prop-



erty, but they go to the husband to sustain the expenses of marriage. In the latter case the wife retains the management of her property, both real and personal, and has the free enjoyment of the revenues. But in either case, to alienate her real property, she must have the consent of her husband or authority from the court. Now, as has been said, the parties here by their contract married under the law of community of acquisitions only, and thereby excluded from the community property the real and personal property which they owned at the marriage. They have not stipulated that they would be separate in goods; so that the property then owned by them simply stands without community. As to the real estate in question, the husband would have the right to manage the same and take the income to sustain the expenses of the marriage; and to enable the wife to sell it she must have his special consent.

These powers in the husband are at war with the rights of a married woman to her separate estate, as that estate is known to our laws. Being the owner of a separate estate under our laws, she receives the income and disposes of it as she sees fit; and she may also sell the property and convey the same by her own deed. As to such property she is a *feme sole* in a court of equity. It results, from the foregoing considerations, that if we give to Madam De Giverville all the rights to and powers over this real estate that she would have under the French laws, still she has no such estate therein as answers to our married women's separate estate.

4. The defendants place some reliance upon the fact that the antenuptial contract is not under seal, and they also insist that the plaintiff should fail on the ground of laches in the institution of this suit; but in view of what has been said, it is unnecessary to consider these questions. In what has been said we have assumed, for the purpose of this case, that they should be resolved for the plaintiff.

The judgment is affirmed.

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**HUSBAND AND WIFE — SEPARATE PROPERTY — CONVEYANCE OF, BY WIFE.** — Under the Tennessee statute of 1869, a married woman owning separate property with a restriction upon her power of disposition might convey it without her husband joining in the deed, if she has had a privy examination before a judge, as provided by the statute: *Robinson v. Queen*, 87 Tenn. 445; 20 Am. St. Rep. 690. A wife has absolute ownership of her separate estate, and may convey or encumber it without her husband joining her in the conveyance: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 312, and note; note to *King v. Rheu*, 23 Am. St. Rep. 83; extended note to *Thomas v. Folwell*,

30 Am. Dec. 233. Under the Pennsylvania act of 1833, a married woman may convey her property, but the husband must join with her in the deed in order to convey her title thereto: *Banck v. Swan*, 146 Pa. St. 444.

**HUSBAND AND WIFE—SEPARATE PROPERTY, WHAT NECESSARY TO THE CREATION OF.**—When the question of the effect of a conveyance to a married woman is involved, the intention of the parties is of paramount importance and if, as between husband and wife, it was intended that the property should be her separate property, the courts will declare the property to be hers: *Flournoy v. Flournoy*, 86 Cal. 286; 21 Am. St. Rep. 39, and note; extended note to *Shaw v. Hill*, 96 Am. Dec. 423. Where land is conveyed to a wife "as her separate property and estate," the title vests in her, and may be conveyed by her: *Shanahan v. Crampton*, 92 Cal. 9.

**CONFLICT OF LAWS—CONTRACTS RESPECTING PERSONALTY—BY WHAT LAW GOVERNED.**—If contracts relate to movables, they are, as a general rule, to be construed according to the *lex loci contractus*; if to immovables or realty, according to the *lex loci rei sita*: *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475, and note. The validity of a contract relating to the sale of personal property is to be tested by the laws of the place where the contract was made: *Born v. Shaw*, 29 Pa. St. 288; 72 Am. Dec. 633, and note; *Speed v. May*, 17 Pa. St. 91; 55 Am. Dec. 540, and note; note to *Miles v. Oden*, 19 Am. Dec. 184; extended note to *Ramsey v. Stevenson*, 12 Am. Dec. 470.

**CONFLICT OF LAWS—CONTRACTS RESPECTING REALTY—BY WHAT LAW GOVERNED.**—A conveyance made in New York of lands in West Virginia is to be given effect by the laws of West Virginia: *Klinck v. Price*, 4 W. Va. 4; 6 Am. Rep. 268. The transmission of title to real estate is governed by the laws of the state in which it is situated: *Peck v. Cary*, 27 N. Y. 9; 84 Am. Dec. 220, and note; *Donaldson v. Phillips*, 18 Pa. St. 170; 55 Am. Dec. 614, and note; *Ross v. Barclay*, 18 Pa. St. 179; 55 Am. Dec. 616; *Baxter v. Wiley*, 9 Vt. 276; 31 Am. Dec. 623, and note; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264, and note.

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## KUNZE v. EVANS.

[107 MISSOURI, 437.]

**BOUNDARY LINE—NO ADVERSE POSSESSION WHERE EACH PARTY CLAIMS ONLY TO TRUE LINE BETWEEN THEM.**—A party in possession of land, claiming only to the true line according to the deed under which he holds, who has never been in actual occupancy or claimed beyond the true line and regardless of it, is only entitled to the quantity called for by his deed, although he is mistaken as to the true location of the boundary line. Where adjacent owners of land claim only to the true line between them, without intending to claim beyond it, the possession of one beyond the true line is not adverse to the other.

**EJECTMENT.** The opinion states the case.

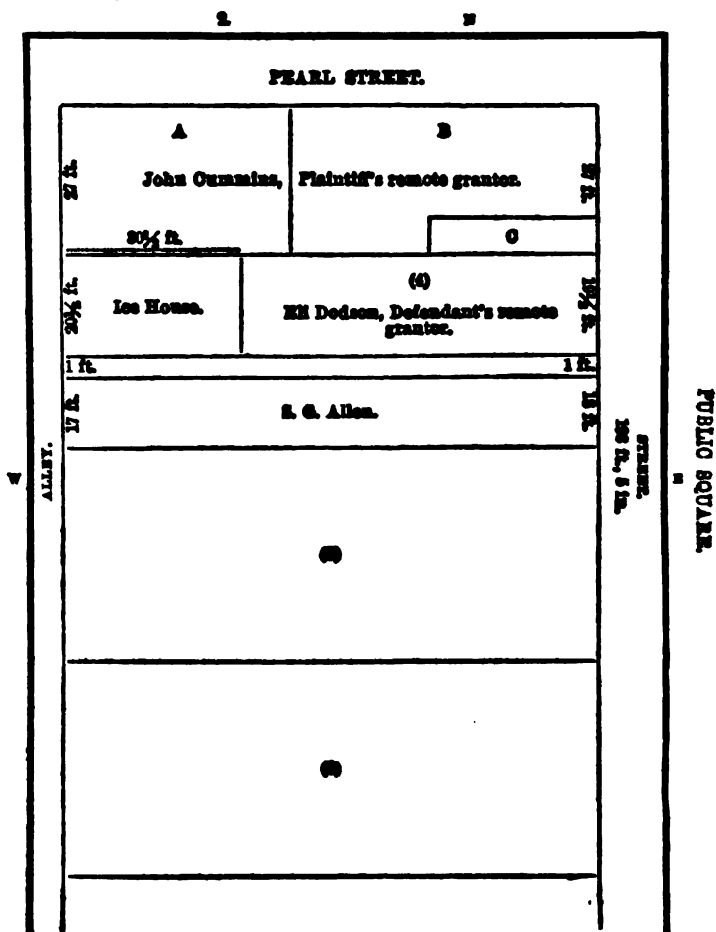
*James S. Wooldridge and H. Clay Daniel*, for the appellants.

*Whitsitt and Jarrott*, for the respondent.

**BRACE, J.** This is an action of ejectment for a strip of ground in lot 4, in block 2, in the original town of Harrison-

ville in Cass County, instituted July 2, 1887. The plaintiff in his petition claimed three feet by thirty feet six inches. The case was tried by the court without a jury, and he obtained judgment for two feet two inches, by thirty feet six inches, of the land sued for, from which the defendants appeal. The parties are coterminous proprietors each of a subdivision of said lot, and the suit grows out of a dispute about the boundary line between them. The title of each is deraigned by mesne conveyances from Joel D. Campbell, who owned the whole of lot 4, but conveyed it in subdivisions.

The following diagram will illustrate block 2, and the lot as thus conveyed: —



The evidence tended to show that lots 4, 5, and 6 as originally platted and laid out were of equal size, and that the whole length of the block from north to south as actually built upon and occupied from the beginning is one hundred and ninety-three feet five inches; giving a width to each lot of sixty-four feet five and two thirds inches (say sixty-four feet six inches).

In January, 1845, Campbell conveyed to Eli Dodson the middle division of lot 4, describing its boundaries as "beginning eighteen feet north of the northeast corner of lot 5, block 2, running thence north nineteen and one half feet, thence west one hundred and sixty-five feet to the alley, thence south nineteen and one half feet, thence east to the place of beginning." The Dodson subdivision, with one foot more on the south subsequently acquired by his grantees and transmitted, making twenty and one half feet front, is the part of said lot the title to which is vested in the defendant by the record.

On the 7th of December, 1846, Campbell conveyed to John Cummins the north subdivision of lot 4, describing its boundaries as "all that part of lot number 4, in block number 2, in the city of Harrisonville, north of Eli Dodson's line, which part of said lot is about twenty-nine feet fronting the public square, and extends west back to the alley." The plaintiff has acquired the Cummins title to this part of said lot. The remaining subdivision on the south was afterwards conveyed by Campbell in 1849 to S. G. Allen, described in the deed as "part of lot 4, in block 2, fronting on the street about eighteen feet, and running back west the same width, the whole length of said lot, together with the storehouse situated on the same."

It will be observed in these deeds that the width of the lot is estimated at sixty-six feet six inches; that the Dodson deed, under which defendant claims, is the prior one, and fixes specifically the boundaries and quantity conveyed; that the quantity conveyed in the Cummins deed under which plaintiff claims is estimated, and the southern boundary of the land conveyed established, by the Dodson line. Consequently the lot in fact only fronted sixty-four feet six inches after Dodson got his nineteen feet six inches; eighteen feet north of the south boundary of the lot there remained for Cummins only twenty-seven feet front, instead of twenty-nine feet as estimated, and the true line between the coterminous proprietors would be a line drawn east and west twenty-seven feet south of the north line of lot 4.

In 1868, the plaintiff acquired title to the Cummins lot by three separate deeds for the subdivisions thereof, respectively marked on the diagram A, B, and C. The land sued for, which he claims is in the possession of the defendant, is three by thirty and one half feet off the south side of A. The deed under which he claims describes that subdivision as follows: "A part of the west end of lot 4, in block 2, in the city of Harrisonville, bounded as follows: Beginning at the northwest corner of said lot 4, running thence south with the alley twenty-nine feet, thence east sixty and one half feet, thence north twenty-nine feet, thence west with the street sixty and one half feet to the place of beginning."

In 1874, the defendant Evans bought the Dodson lot and went into possession; business houses were on the front of each lot when each of them went into possession. When Evans went into possession, the two buildings on the fronts of each lot sat against each other. There was a small tenement on plaintiff's rear lot, not on the strip in controversy. The rear of their respective lots fronting on the alley seems to have been uninclosed otherwise.

In the fall of 1882 the defendant erected an ice-house on the rear of his lot facing the alley, and in the year following the parties tore down the old and put up new buildings on the front of their lots facing the public square; the partition wall of these buildings was paid for jointly, its line being fixed by some measurement that does not appear clearly in the record.

In 1887, some months before this suit was brought, the plaintiff had a survey made of his rear lot A, according to the calls in his deed. Beginning at the northwest corner of the lot and running south, at a distance of twenty-six feet six inches, the surveyor struck the north wall of defendant's ice-house, disclosing the fact that it was six inches beyond the true line, on plaintiff's premises. The surveyor in another part of his testimony says the ice-house was twenty-six feet seven inches; in the latter case he probably meant the space covered by the roof of the ice-house, which projected considerably over the wall of the house; however that may be, according to the true line, the judgment for the plaintiff should have been for the strip of ground beginning at a point twenty-six feet six inches south of the northwest corner of lot 4, running thence south six inches, thence west thirty and one half feet, thence north six inches, thence east thirty and one half feet to the begin-

ning; instead, the judgment of the court removed the true line south one foot and two inches, and gave the plaintiff one foot and two inches by thirty and one half feet in addition to what he was entitled to, off the land of defendant, making the south boundary line of plaintiff's lot twenty-eight feet two inches from the north line of the lot, instead of twenty-seven feet, as it should have been. This result was evidently reached by the trial court (from the instructions given for the plaintiff) upon the theory that the plaintiff had acquired title by adverse possession to all that part of lot 4 lying north of a line drawn across said lot from east to west, twenty-eight feet two inches south of the north line of said lot; based probably upon some measurements or estimates made of the frontage of the buildings of the parties on the public square, either as they existed at the time of the trial, or before the new buildings were erected.

It is not clear, on the evidence, upon what *data* the court did settle upon this as the line of actual occupancy by the parties in front, nor do we find it necessary to inquire further into that question. The entry of which plaintiff alone complains in his petition was upon his lot A, made by the defendant in 1882. For more than ten years prior to that entry, he had been in possession of that lot, claiming it only under his deed, and to the true line according to the deed, which he always thought, and still thinks and contends, is twenty-nine feet south of the northwest corner; but he had never been in the actual occupancy of, nor had he ever claimed, any land south of the true line and regardless of it. Consequently he has not been in adverse possession of any of the land included in the judgment south of a line distant twenty-seven feet from the north line of lot 4, and should not have had recovery for any land south of that line: *Finch v. Ullman*, 105 Mo. 255; 24 Am. St. Rep. 383; *Crawford v. Ahmes*, 103 Mo. 88; *Handlan v. McManus*, 100 Mo. 124; 18 Am. St. Rep. 533; *Krider v. Milner*, 99 Mo. 145; 17 Am. St. Rep. 549; *Skinker v. Haagsma*, 99 Mo. 208, and cases cited. There was no adverse possession of the premises in dispute in the case, each party claiming only to the true line between them. The judgment is reversed and cause remanded for new trial.

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**ADVERSE POSSESSION FOUNDED ON MISTAKE.** — The possession of coterminous proprietors under a mistake as to the true line, and without intending to

claim beyond it, will not work a dismissal in favor of either: *Flack v. Ulman*, 105 Mo. 255; 24 Am. St. Rep. 383, and extended note; *Mills v. Panny*, 74 Iowa, 172; 7 Am. St. Rep. 474, and note; *Crawford v. Ahrens*, 103 Mo. 83; *McDonald v. Fox*, 20 Nev. 364.

## STATE EX REL. CARROLL v. DEVITT.

[107 Missouri, 578.]

**OFFICER'S RETURN TO WRIT PRIMA FACIE EVIDENCE.** — An officer's return to a writ is *prima facie* evidence, even in his own favor.

**WRIT OF POSSESSION AFFORDS PROTECTION TO OFFICER, WHEN.** — A writ of possession, which is fair and regular on its face, and is issued by a court having jurisdiction of the subject-matter of the action, constitutes a valid protection to the officer who executes it.

**TRESPASSER AB INITIO, OFFICER BECOMES, WHEN.** — An officer who, in executing a writ of possession, handles property so carelessly and roughly as to injure and break it, becomes a trespasser *ab initio*, and will not be protected by his writ, notwithstanding it was fair and regular on its face.

**ACTION on a constable's bond.** The opinion states the case.

**H. A. Loevy**, for the appellant.

**Henry Boemler**, for the respondents.

**SHERWOOD, P. J.** Action on constable's bond; two counts in the petition, the first count based on an alleged trespass, the second for an alleged false return.

The court below at the close of plaintiff's case gave an instruction in the nature of a demurrer to the evidence, whereupon a nonsuit, with an ineffectual endeavor to set the same aside, hence this appeal. These counts will be discussed in inverse order.

1. The return of the constable was *prima facie* true in this action against him, charging that his return upon the notice was false, which notice was issued by Sheehan, the justice to whom the cause was transferred on affidavit made by relatrix, in order to change the venue from Byron, justice, before whom the action for possession was brought by Staed Brothers. Even in his own favor the return of an officer is *prima facie* evidence: Crocker on Sheriffs, sec. 45; *Burgert v. Borchert*, 59 Mo. 80. Besides, the testimony of the relatrix virtually shows that she was duly served with the notice in question. No error was, therefore, committed in sustaining the demurrer to the evidence on this count.

2. Now, as to the count in trespass, Sheehan, the justice of the peace, undoubtedly had jurisdiction over the subject-matter of the action brought by Staed Brothers, and the writ which he issued to the constable was undoubtedly fair on its face. This being the case, the writ constituted a valid protection to the officer: *Murfree on Sheriffs*, secs. 877, 926, 1127, 1128; *Melcher v. Scruggs*, 72 Mo. 406.

3. But notwithstanding the writ of possession was fair and regular on its face, yet this does not and could not authorize the constable, or those acting under his orders, to do as Mrs. Lizzie Buda testified they did do, to wit, "handled the furniture very carelessly and roughly, and broke some of it." No writ, however valid or regular on its face, will sanction anything of this sort. An officer who misuses property in such a way as stated becomes a trespasser *ab initio*, and his writ affords him no protection: *Cooley on Torts*, 2d ed., 541.

As to the count in trespass, therefore, the action of the lower court was erroneous, as there was some evidence to sustain that count. Judgment reversed and cause remanded.

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OFFICER'S RETURN, as to the conclusiveness of, see *Stewart v. Duncan*, 47 Minn. 285, *ante*, p. 367, and note.

OFFICERS—PROTECTION AFFORDED TO, BY WRIT. — A writ regular on its face protects a ministerial officer in its execution: *Billings v. Russell*, 23 Pa. St. 199; 62 Am. Dec. 330, and note; *Pierson v. Gale*, 8 Vt. 509; 30 Am. Dec. 437, and note; extended note to *Sasacool v. Boughton*, 21 Am. Dec. 190.

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## REINHARD v. VIRGINIA LEAD MINING COMPANY.

[107 MISSOURI, 615.]

ESTOPPEL—GRANTOR OF LAND ESTOPPED BY HIS DEED TO CORPORATION, WHEN. — Where a grantor, for a valuable consideration and in good faith, conveys land, by a deed which is duly recorded, to a corporation named therein as grantee, such grantor and those claiming under him will be estopped to deny the capacity of such grantee to take the land, although, owing to a mistake of the attorney, the incorporation of the grantee was not perfected until after the conveyance was made.

SUIT to quiet title. The opinion states the case.

*J. O. Kiskaddon*, for the appellants.

*John W. Booth and T. B. Crews*, for the respondents.

MACFARLANE, J. This is a suit in equity to quiet the title



to certain real estate, of which plaintiffs claim they are the owners.

The material facts are undisputed. On the nineteenth day of December, 1872, Nathaniel Sands and Rowland B. Hazard, in the city of New York, executed and acknowledged in due form a certificate in writing for the purpose of incorporating under the laws of the state of Missouri a mining company, and adopted as the corporate name "The Virginia Lead Mining Company." This certificate of incorporation shows a full compliance with the laws of this state up to and including its proper acknowledgment. Instead of having the certificate recorded by the recorder of deeds of the county, as required by section 2, article 7, chapter 37, Wagner's Statutes, page 333, it was sent to the clerk of the county court for record, where it remained until May 19, 1874, when the incorporators, learning the mistake, had it filed and recorded by the proper officer, and on August 8, 1874, also had a copy filed and recorded with the secretary of state, on which day a certificate of incorporation was issued.

It is agreed that the land in suit, on the twenty-eighth day of December, 1872, belonged to defendant Amos W. Maupin. On that day Nathan Sands, one of the parties so attempting to incorporate, and representing the supposed corporation, purchased the land from Maupin, paying therefor two thousand five hundred dollars. The deed was made to the Virginia Lead Mining Company as grantee. This deed was recorded April 22, 1873. On the twenty-eighth day of September, 1873, said supposed corporation, by persons representing to be its proper officers, in due form of law made a deed of conveyance of the land to Robert C. Sands, which was recorded June 24, 1874.

On the eleventh day of December, 1879, defendant Robert C. Sands made a deed purporting to convey said lands to defendant the Missouri Lead Mining and Smelting Company, a corporation under the laws of Great Britain. This deed was recorded December 17, 1879. The last-named corporation conveyed the land to defendants George Hopkins and Samuel Pope, as trustees, to secure certain bonds issued by the company. These parties are all made defendants.

On the twenty-eighth of November, 1879, a judgment was rendered in the circuit court of said county against the said Maupin. Under an execution upon this judgment, the land was sold to Frederick W. Reinhard, to whom a deed was exe-

cuted June 5, 1885. The said Reinhard, on June 15, 1885, conveyed the lands to plaintiffs. Plaintiffs complain that all the deeds to and from defendants cast a cloud upon their title, and pray that their title be quieted, and said deeds be declared inoperative and void.

The organizers of the first corporation were not informed that the articles of incorporation had not been filed and recorded until May, 1874. Upon making the certificate of incorporation, the parties thereto proceeded to the organization of the board of directors and elected officers, and thereafter assumed to act as a corporation, under the name of "The Virginia Lead Mining Company." The business was conducted in accordance with the laws governing corporations in the state of Missouri. The error in sending the certificate to the county clerk, instead of the recorder, was made by the attorney of the promoters, and as soon as the mistake was discovered it was corrected. These facts were alleged in the answer of defendant. Upon a trial, plaintiffs' bill was dismissed and judgment was entered for defendants, and plaintiffs appeal.

It is readily seen, from the foregoing statement, that the controverted question in this case hinges on the proper effect to be given the deed from Amos W. Maupin to the Virginia Lead Mining Company. This deed was made and recorded, as also was the certificate of incorporation, long prior to the judgment against Maupin, under which plaintiffs claim title, and consequently there can be no question of the want of notice of this deed when plaintiffs' ancestor bought under execution. No offer is made by plaintiffs to refund the purchase-money. They rely for relief on the naked legal proposition that the deed from Maupin to the mining company is absolutely null and void, because the corporation at the time did not have the capacity to take the title. Defendants, on the other hand, insist that the corporation existed, *de facto*, at the time of the execution of the deed, and it therefore passed the title; and that though it may not have been even a *de facto* corporation, still Maupin and his grantees are, under the circumstances, estopped to question its validity.

Plaintiffs assert their supposed wrongs, and seek relief in a court of equity. They virtually admit that their grantor sold the land in good faith, presumably for its full value, accepted the money, and made a deed, believing at the time, and intending, to part with the title and vest it in the corporation. The promoters of the corporation purchased the land, and paid

out their money, under the belief that the corporation was authorized, at that time, to hold the title. They acted, as was supposed, in full compliance with the laws of the state provided for the management of corporations. The demands of plaintiffs do not commend themselves to a court of equity, and unless the court is fettered by legal principles, they should not be heard to assert them.

The legal principles invoked by plaintiffs are: 1. In order to a valid and effectual conveyance of land, there must be a grantee in being at the time of the delivery of the deed; and 2. A corporation has no existence until after a full performance of every requirement of the law under which it is authorized. Both these propositions have support in decisions of this court.

It has been held, in this state, as at common law, that a deed will not take effect, or have any validity as a conveyance of the property, unless the grantee therein is in being at its delivery. A deed to W. H. Phelps & Co., which was a partnership firm, composed of Phelps and two others, was held to pass no title to the firm, or the two persons not named: *Arthur v. Weston*, 22 Mo. 379. So it was held in *Douthitt v. Stinson*, 63 Mo. 268, that a deed to a pretended corporation, which had no real existence, was absolutely void. In *Thomas v. Wyatt*, 25 Mo. 24, 69 Am. Dec. 446, a patent issued to a fictitious person was held to be a nullity. A deed to the directors of a corporation which was named therein, which then had no existence, but was subsequently organized, was held to pass no title to the corporation.

These decisions were all made in actions at law. Judge Leonard qualifies his decision, in the case first cited, by the remark: "We must not, however, be misunderstood; our present decision refers to the transfer of the legal estate only, and does not touch the equitable rights of the parties growing out of the transaction."

It has also been held that a corporation is not fully authorized to transact the business for which it was created until the articles of association had been filed with the secretary of state, and a note executed by the directors, signing their names as such before filing the articles with the secretary, became the personal note of the directors, and did not bind the corporation: *Hurt v. Salisbury*, 55 Mo. 312. This decision was approved in the subsequent cases of *Martin v. Fewell*, 79 Mo. 401, and *Richardson v. Pitts*, 71 Mo. 129. On the other hand, in *Granby*

*Mining Co. v. Richards*, 95 Mo. 110, it was held that the failure to file a certificate of incorporation with the circuit clerk, as was required by the statute, was an "omission of which the state alone should complain." The suggestion was made in that case, that the rule of *Hurt v. Salisbury*, 55 Mo. 312, should not be extended. These suits were against persons assuming to act as officers of corporations which had not fully organized for the transaction of business.

We do not regard these lines of decisions as bearing upon the question in this case, or as inconsistent with the doctrine of estoppel invoked by defendants. The grantors of plaintiffs dealt with the officers of this corporation in the corporate name, received the money of the supposed corporation, and undertook to convey the land to it in consideration thereof. The question here is, as has been suggested, whether plaintiffs occupy a situation in which they can deny the validity of the corporation or its acts. This question is, we think, well settled in this state, and there is no necessity of inquiring whether or not this was a *de facto* corporation capable of taking the title of land by grant.

The facts in the case of *Broadwell v. Merritt*, 87 Mo. 99, are very similar to those in the case under consideration. The articles of association were written, signed, acknowledged, and recorded as required by the statute, but a copy was not filed with the secretary of state, which was also required. The business of the attempted organization was, with others, that of buying and selling real estate. The officers of the corporation bought a tract of land from one Little, and the deed was made to the corporation. Some years after that, the organization of the corporation was perfected by filing with the secretary of state a copy of the articles as required. Before this was done, however, and about six years after making the deed to the corporation, Little conveyed the land by quitclaim deed to Broadwell, who sued the grantee of the corporation in ejectment. It was held that the validity of the corporation could not be challenged by plaintiff, on the ground that there was no grantee therein competent to take the title. The court in that case, speaking through Judge Ray, says: "We do not think that Little, after receiving the large and valuable consideration paid him for the land, and making his said deed to the association, and taking the trust deed from it, and putting it in possession thereof, and allowing it to be improved and held under his title for years, could or ought to be heard to

call in question the capacity or power of the association to take title to the property, and hold or enjoy the same. Broadwell, who takes under Little under his said subsequent deed, is in no better position. He is in privity with, and bound and estopped by what would bind and estop, said grantor." A number of cases of this and the United States supreme court are cited in support of the proposition.

This decision was followed and approved in *Ragan v. McElroy*, 98 Mo. 350, in which also a deed to a corporation was objected to, on the ground that it had not been shown that the corporation was properly organized. It was held that the grantor and his heirs were forever estopped from denying the corporate existence of the grantee, as against those who have acquired title and possession under that deed. In a similar case in the United States supreme court, Mr. Justice Davis says: "No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate, *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it, and in such a case the party who makes a sale of real estate to it is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase": *Smith v. Sheeley*, 12 Wall. 358; *National Bank v. Matthews*, 98 U. S. 621. These decisions commend themselves as being founded on the soundest principles of equity and right.

It is true, as insisted, that no question of estoppel can arise under a deed which is absolutely void. This proposition was distinctly held in *Douthitt v. Stinson*, 63 Mo. 268. In that case, however, there was no law authorizing the formation of the corporation to which attempt was made to convey the land. Estoppel applies to the regularity of the organization of the corporation, and can only apply when there is authority of law to organize: *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89. The statutes of this state gave ample authority for the organization of the Virginia Lead Mining Company, and plaintiffs are estopped to deny the regularity of its organization.

Judgment affirmed.

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**ESTOPPEL TO DENY EXISTENCE OF CORPORATION.** — One dealing with a corporation as such is estopped to deny its corporate existence: *Yard v. Pacific etc. Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 467, and note; *Winget v. Quincy, etc. Ass'n*, 128 Ill. 68; *Dutchess Cotton Manufactory v. Davis*, 14 Johns. 238; 7 Am. Dec. 459, and note. If a law exists authorizing such a corporation, a

party contracting with it will be estopped to deny its existence: *Snyder v. Studebaker*, 19 Ind. 462; 81 Am. Dec. 415, and note; *Brookville etc. Turnpike Co. v. McCarty*, 8 Ind. 392; 65 Am. Dec. 768, and note. One who executes a note to a corporation is estopped to deny its existence at the time the note was executed: *Jones v. Bank*, 8 R. Mon. 122; 46 Am. Dec. 540, and note; *Congregational Society v. Perry*, 6 N. H. 164; 25 Am. Dec. 455, and note. One who has conveyed property to a corporation and has acted as one of its officers is estopped to deny its *de facto* existence: *Bates v. Wilson etc. Co.*, 14 Col. 141.

CASES  
IN THE  
SUPREME COURT  
OF  
MONTANA.

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PETER v. STEPHENS.

[21 MONTANA, 116.]

**PLEADING — STATUTE OF LIMITATIONS.** — A complaint alleging the plaintiff to have been the owner of real property for more than five years previously to the commencement of the action, and that the defendant entered upon such property and ousted plaintiff therefrom at a time named, also more than five years before the filing of the complaint, is not subject to demurrer on the ground that it shows that the plaintiff's cause of action is barred by the statute of limitations declaring that "no action for the recovery of real property shall be maintained unless the plaintiff, or those under whom he claims, have been seized or possessed of such property within five years before the commencement of the act in respect to which the action is prosecuted." There is nothing in the complaint tending to show that the defendant's acts were accompanied with any claim of title on his part.

*Henry C. Stiff and Kenneth M. Nicholes, for the appellant.*

*Toole and Wallace, for the respondent.*

**BLAKE, C. J.** The appellant filed, August 13, 1890, his complaint in the court below, and alleged "that on the second day of April, A. D. 1885, the said plaintiff became, and ever since said date has been, and now is, the owner and seized in fee, and entitled to the possession of all that certain lot of land [description]; that while the plaintiff was such owner, and so seized and possessed, and entitled to the possession of said land and premises, the defendant did, on the day and year aforesaid, wrongfully and unlawfully enter into and upon the following part and portion of said lot of land, viz. [description], and did oust and eject the plaintiff therefrom, and ever since that day wrongfully and unlawfully withheld, and still

and now wrongfully and unlawfully does withhold, the possession thereof from the plaintiff, to his wrong, injury, and damage in the sum of one thousand dollars; that the value of the rents and profits of the said land and premises is two hundred dollars per month; and that by reason of the unlawful withholding of the said land by the defendant, as aforesaid, plaintiff has been deprived of said rents during all the time since the second day of April, A. D. 1885, and by the continuance thereof will be deprived of the use and occupation of the same, to his loss and damage in the sum of two thousand dollars." The prayer is for "the restitution of said land and premises," and damages.

The demurrer of the defendant is as follows: "That the said complaint does not state facts sufficient to constitute a cause of action, in this, that it appears from the face of the complaint that the defendant has been in possession of the property described in the plaintiff's [complaint] for more than five years prior to the commencement of the plaintiff's action, and that said action is barred by sections 29 and 30, title 3, chapter 2, Compiled Statutes of Montana, and that the defendant claims the benefit of the same."

The demurrer was sustained by the court, and upon the refusal of the plaintiff to file an amended complaint, judgment was entered for the defendant for his costs.

The sections of the Code of Civil Procedure which are mentioned in the demurrer read as follows:—

"Sec. 29. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seised or possessed of the property in question within five years before the commencement of the action.

"Sec. 30. No cause of action or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted, or the defense is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made."

The briefs of counsel restrict our inquiry to one question, Does the complaint show upon its face that the defendant enjoyed the adverse possession of the land in controversy more than five



years before the commencement of this action? It is alleged that the plaintiff was, at all the times named in the pleading, "the owner and seised in fee" of the premises. This rule has been prescribed by the Code of Civil Procedure: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof, within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action": Sec. 32. After quoting this statute in *Lambs v. Dodson*, 4 Mont. 587, Mr. Justice Galbraith said: "The true principle, therefore, is, that he who has the legal title to real property is presumed to have the right to the possession thereof until better right is shown." See also *National Min. Co. v. Powers*, 3 Mont. 344.

By the allegations of the complaint the defendant is a trespasser, and there is not a word which indicates that his acts with reference to the property are accompanied with any claim which is inconsistent with the title of the plaintiff. The intention of the party, which is a vital element of an adverse possession to realty, is not shown, and there is nothing to rebut the presumption of the statute *supra* from the ownership in fee: *McDonald v. Fox*, 20 Nev. 364, and cases cited; *Sharp v. Daugney*, 33 Cal. 505; *Figg v. Mayo*, 39 Cal. 262; *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100; *Roman Catholic Archbishop v. Shipman*, 79 Cal. 288; *Harvey v. Tyler*, 2 Wall. 328; *Probst v. Presbyterian Church*, 129 U. S. 182. The opinions in the last two cases were delivered by the learned jurist, Mr. Justice Miller, who said in *Harvey v. Tyler*, 2 Wall. 328: "The third and last instruction given at the instance of plaintiffs had reference to the question of adverse possession in its relation to the statute of limitations. Its purport was, that if plaintiffs' title was found to be the paramount title, and any of the defendants entered upon and took possession of the land, without title or claim, or color of title, that such occupancy was not adverse to the title of plaintiffs, but subservient thereto. We think this law to be too well settled to need argument to sustain it. . . . Where there is no claim of right, the possession cannot be adverse to the true title." In *Probst v. Presbyterian Church*, 129 U. S. 182, the court approved *Harvey v. Tyler*, 2 Wall. 328, and *Ewing v. Burnet*, 11 Pet. 41, in

which this language is used: "An entry by one man on the land of another is an ouster of the legal possession, arising from the title or not according to the intention with which it is done; if made under claim and color of right it is an ouster; otherwise it is a mere trespass; in legal language, the intention guides the entry and fixes its character."

It is therefore ordered and adjudged that the judgment be reversed, and that the cause be remanded, with directions to overrule the demurrer.

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**ADVERSE POSSESSION.**—Possession of land is always presumed to be in subordination to the true title, and one who claims to have acquired title by adverse possession must show that he or his predecessors in interest held the land in hostility to the true owner, claiming the title thereto: *Doherty v. Matsell*, 119 N. Y. 646. And the actual, continued, visible, notorious, and hostile possession of land is tantamount to a claim of ownership: *Shearer v. Middleton*, 88 Mich. 622. The intent to make the possession adverse is essential: *La Frombois v. Jackson*, 8 Cow. 589; 18 Am. Dec. 463; *Colton v. Republican V. L. Ass'n*, 23 Neb. 75; 8 Am. St. Rep. 114; *McDonald v. Fox*, 20 Nev. 364; *Flynn v. Lee*, 31 W. Va. 487; *Evans v. Templeton*, 69 Tex. 375; *Maple v. Stevenson*, 122 Ind. 368. It is enough if there be an assertion of ownership, and unbroken possession for the requisite length of time: *Herff v. Griggs*, 121 Ind. 471. Color of title is not necessary in Indiana: *Bowen v. Swander*, 121 Ind. 164. The possession of real estate may be open and notorious, and still not adverse: *Crawford v. Ahrens*, 103 Mo. 88. It must be of such a character as to afford the owner the means of knowing of it and of the claim: *Hinckley v. McClear*, 18 Or. 127.

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## IN RE MACKNIGHT.

[11 MONTANA, 126.]

**HABEAS CORPUS.**—THE WRIT OF CERTIORARI may be issued by the supreme court of Montana to bring up for review, upon *habeas corpus*, the proceedings of the district court relating to the conviction and sentence of the prisoner for alleged contempt of court.

**WITNESSES ARE NOT BOUND TO ANSWER QUESTIONS WHICH ARE NOT LEGAL AND PERTINENT** to the matter in issue.

**CONTEMPT OF COURT IS NOT COMMITTED BY THE REFUSAL OF THE PUBLISHER OF AN ARTICLE**, the publication of which is prosecuted as a contempt of court, to give the names of the persons making the comments referred to in such article. If the publication of the article was a contempt, relevant inquiry ceased when it was ascertained who was its author and publisher.

**A CONTEMPT OF COURT IS a willful disregard of its authority**, and may consist of disorderly or insulting language or behavior in its presence tending to disturb its proceedings or impair the respect due to its authority, or a disobedience of its rules or orders interfering with the due administration of law.

**CONTEMPT OF COURT.** — PUBLISHER OF A NEWSPAPER is not liable to punishment as for a contempt of court because he publishes what purports to be the statements of third persons, to the effect that the public and the judge of a designated county, in which a cause was pending, were prejudiced; that the money involved in the cause had turned the head of every man in the county; that they had all voted for the judge because they knew his views, and that he could not be won over to any other; that there was money enough in the business to corrupt every corruptible man in the state; and that it had caused a deadly bias in the minds of men who could not be bought with money at all; and that neither the judge nor any jury that could be obtained in the county would render a decision according to the evidence.

*Elbert D. Weed*, for the petitioner.

*Thompson Campbell*, *amicus curiæ*.

HARWOOD, J. By return made to the writ of *habeas corpus*, and the writ of *certiorari* issued in aid thereof, it appears that the prisoner was adjudged, by the district court of the second judicial district, guilty of having committed a contempt of that court, and was therefore committed to jail. The facts and proceedings whereby the judgment and order of commitment was made appear by the returns as follows: A certain newspaper, known as the Helena Daily Journal, printed and published at the city of Helena, and of general circulation, contained in its issue of July 7, 1891, among other items, the following: —

“WHY THERE’S PREJUDICE.

“An old Montanian, who is very familiar with all the ins and outs of the Davis will case, was discussing yesterday the subject of the change of venue asked in this celebrated case, when he said: ‘Prejudice? Why, of course, there’s prejudice. The money involved in this case has turned the head of every man, woman, and child in Silver Bow County. Republicans and Democrats are sworn allies and friends in all that pertains to keeping the estate in the hands of the Butte parties, and they stood together for the re-election of Judge McHatton solely because they knew that he could never be won over to any other view of the will than the Butte view. This was why no Republican nomination was made, and why McHatton was so readily adopted as the candidate and elected by so pleasing a vote. I tell you there is money enough in this business to corrupt every corruptible man in the state, and it has caused a deadly bias in the minds of some men who could not be bought with money at all. There are not more than one or two cases to-day before the courts of this country in which

the stake involved is so great. Nothing like a fair trial can ever be had in Silver Bow County, as neither a judge nor a jury could be obtained there that would render a decision in accordance with the evidence. Therefore, unless a change of venue is granted, the jig is up for the contestants of the will.' This gentleman is a Republican who travels a good deal about the state, but a Democrat beside him, who has been a good deal in Silver Bow County, said he had to admit the truth of the stricture."

On the ninth day of July, 1891, Hon. John J. McHatton, judge of department 1 of said court, made and filed in his court an affidavit setting forth that an action or proceeding for the probate of an alleged will of Andrew J. Davis, deceased, was pending in said court; that such case or proceeding was generally known as the Davis will case; that said MacKnight and other persons named in the affidavit were the editors and publishers of said newspaper, and published the matter recited, and that "said publication has come under the observation of the judge of said court, and the charges therein made are false and contemptuous."

Upon the filing of the affidavit, said court issued an attachment for the persons charged with commission of contempt by said publication. In the proceedings which were afterwards had before said court, in the matter of this alleged contempt, the petitioner, MacKnight, appeared to show cause why he should not be punished for contempt as charged; and answered, admitting that he was the managing editor of said newspaper at the time of said publication; admitted that he alone wrote and caused to be published in said newspaper the matter recited; but denied that the same was a contemptuous act towards said court, or the judge thereof, or was so intended by the author and publisher thereof.

Then followed an inquiry before said court, wherein said MacKnight, under oath, explained to the court where and under what circumstances he heard the comments which were recited in the publication. He stated, in effect, that at the time he wrote and published said comments, a proceeding for an order for a change of the place of trial of the contest of said alleged will in said Davis will case was being heard upon appeal by the supreme court of this state; that he had heard much comment by various persons, at different hotels, upon the streets, and about the court-house in the city of Helena, in relation to said application for a change of venue, which

expressions, uttered by several persons, were put together, and made up the matter published; that said matter was published in a column which purported by its heading to contain street gossip and incidents of interest.

At this point the inquiry was directed to the ascertainment of the names of the persons who had made the comments mentioned.

In answer to questions calling for the names of such persons, the witness said: "There were individuals that made some of the comments in the article whose names I cannot possibly recall, but it was in private conversation." In only one case could the witness recall the person who stated what constituted a portion of the comment published, namely, that which related to the political situation in Silver Bow County at the time of the last election. The witness said: "As a matter of fact, the gentleman who made those remarks did not wish them printed. He had no feeling or interest in the Davis will case. I gave him my word that I would not in any way disclose his name, and wrote the paragraph several days after the conversation." The name of the person in question was demanded by the court under peril of commitment for contempt if the witness refused to disclose it; but the witness declined to state the name of such individual without his permission. A continuance was then had to give the witness an opportunity to consult said person, and find whether it would be agreeable to have his name mentioned to the court in this proceeding. On resuming the hearing, the witness stated that the individual in question, whose comments had been thus taken by the witness and published, would not consent to have his name given to the court, and the witness declined to disclose it; whereupon the court adjudged the witness guilty of contempt for refusing to disclose the name of the person demanded, and refused to pass upon the original charge of contempt in said proceeding, and refused to hear counsel for prisoner upon the question as to whether in law any contempt had been committed, and ordered the prisoner committed to jail. It is this imprisonment which the prisoner insists is illegal.

Upon the hearing before this court, counsel who appeared in the court below as *amicus curiæ* in the proceedings also appeared here, and raised the point that this court has no jurisdiction to bring up for review by writ of *certiorari* the proceedings of the lower court in the matter in question. In support of this position, he cites that clause of section 3, article 8, of

the constitution, which provides that the supreme court "shall have power, in its discretion, to issue and to hear and determine writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, prohibition, and injunction, and such other original and remedial writs as may be necessary or proper to complete exercise of its appellate jurisdiction." Counsel contends that the writ of *certiorari*, and others named in said clause, can only be issued by this court when the same are necessary or proper in the exercise of its appellate jurisdiction, and therefore the issuance of the writ of *certiorari* in this case was irregular, because it was not in aid of the appellate jurisdiction of this court. His position is, that the latter words of said clause relate to the writs specifically mentioned, and restrict this court to the use of said writs in the exercise of its appellate jurisdiction only.

The case at bar presents a striking illustration of the error involved in such a construction of said clause of the constitution as is contended for by counsel. It is clear that this court is given power to issue, hear, and determine all of the writs mentioned, among others the writ of *habeas corpus*. That is conceded by all, but the contention is, that this court can issue, hear, and determine said writs only in the exercise of its appellate jurisdiction. Now, how would the writ of *habeas corpus* be ordinarily used by the supreme court in the exercise of its appellate jurisdiction? So the writ of *certiorari* is among the writs which this court is expressly authorized to issue, hear and determine. Yet that writ is peculiarly inapplicable to use in aid of appellate jurisdiction; and indeed, cannot be lawfully issued in cases where error may be reached by appeal: Code Civ. Proc., sec. 555. Is it to be presumed that the framers of the constitution placed within the jurisdiction of this court these writs, the use and effect of which, in the actual administration of law, is so well defined, and some of which are in no way adapted to or used in the exercise of appellate jurisdiction, and then restricted the use of said writs by this court simply to the aid of its appellate jurisdiction? We think not. The clause carries no such purport with it. The writs named are defined in law; and their use in the administration of justice is fixed by long usage and well-settled principles.

It is provided in the constitution that this court shall have power "to issue and to hear and determine" said writs, which are known and certain implements of courts. Their office

being known, the framers of the constitution understood exactly what jurisdiction was being granted by placing them within the power of the court to issue, hear, and determine, in that there was no uncertain grant of jurisdiction. But the constitution does not stop there. It adds: "And such other original and remedial writs as may be necessary or proper to complete exercise of its appellate jurisdiction." These other original or remedial writs are restricted to the exercise of appellate jurisdiction. Why? Because otherwise this grant of jurisdiction to frame, issue, hear, and determine new writs, heretofore unknown in the administration of justice, would have been the granting of an unknown, unlimited, and undefined power; therefore such other writs were limited to the exercise of appellate jurisdiction.

To further indicate the use which it was intended would be made of the writ of *certiorari*, the same section of the constitution provides that "each of the justices of the supreme court may issue and hear and determine writs of *certiorari* in proceedings for contempt in the district court."

The jurisdictional question raised by counsel is not sustained.

Returning to the consideration of the merits of the proceedings under review, we find counsel for the prisoner challenging the legality of the imprisonment by two propositions.

1. That if a contempt was committed by such publication, as charged, then the contempt was committed by that act, and relevant inquiry ceased when it was ascertained who was the author and publisher; that the prisoner admitted the writing and publishing of the comments as charged, and any inquiry beyond that was irrelevant and illegal; that refusal to answer such irrelevant question was a legal right of witness, and commitment for such refusal was unlawful; 2. That in the main proceedings the matter charged, to wit, the writing and publishing of the matter set forth, did not in law amount to a contempt of court, and therefore the court was proceeding without jurisdiction, and all questions pertaining to the matter in such proceeding were irrelevant and unauthorized, and the witness had a legal right to respectfully decline to answer any or all questions in a case where the court was without jurisdiction.

We are of the opinion that in this case the law fully sustains both propositions in favor of the prisoner. As to the first proposition, the record shows that the prisoner appeared be-

fore the court, and admitted every fact charged as constituting the contempt.

What fact there was in the charge not admitted, or what relevancy there was in the questions which the prisoner refused to answer, the counsel who acted as *amicus curiæ* was unable to explain, and we have been unable to ascertain. It is provided in sections 659 and 660 of the Code of Civil Procedure that witnesses shall answer questions legal and pertinent to the matter in issue. They are not bound to answer questions irrelevant to the issue: *Ex parte Zeelandelaar*, 71 Cal. 238.

After the prisoner had admitted the facts set forth in the charge as constituting a contempt, if, then, an inquiry as to facts outside of that charge was necessary to establish contempt, it follows that no contempt was charged in the proceeding.

But suppose the prisoner had answered the question put to him, and said that A made the remarks about the "political situation in Silver Bow County"; would the offense charged, to wit, the publication of said remarks, have been any more certain, or would the gravity of the offense been any greater or less, than it would have been if B had made those remarks? Suppose, again, the prisoner had answered that A made the remarks, and A had been called and questioned, and said that he got the idea from B, and B had been sent for, and testified that he got the matter from C, and so on, *ad infinitum*; how much would this have added to or subtracted from the offense charged against MacKnight, and the punishment due therefor? It is not unlikely comments were made in reference to the application for change of venue mentioned in the article. Parties on one side of the motion were insisting that the people of Silver Bow County, for various reasons, had become biased or prepossessed with one view of the contest. It was also suggested and attempted to be shown that the judge of the lower court was biased and prejudiced. The motion was brought before the supreme court on appeal, and these propositions as to bias and prejudice were uttered, published, commented upon, and considered. Now, are the parties who entertained and expressed the views that bias and prejudice existed in peril of the jail of Silver Bow County?

The main charge preferred against the prisoner is not within the acts defined by statute as contempts, nor is it within the general definitions of that offense, as found in the authorities



upon this subject. The principal ingredient of the definition of "contempt" is disregard of the authority of the court. It is provided in our statute that certain acts or omissions described "are contempt of the authority of the court: 1. Disorderly, contemptuous, or insolent behavior towards the judge while holding court, tending to interrupt the due course of a trial or other judicial proceeding; 2. A breach of peace, boisterous conduct, or violent disturbance, tending to interrupt the due course of the trial or other judicial proceeding": Code Civ. Proc., sec. 584.

Definitions taken from works of authority are as follows:—

"A willful disregard or disobedience of a public authority": Bouvier's Law Dict.

"Disrespect; willful disregard of the authority of a court or legislature": Anderson's Law Dict.

"Contempt is disorderly or insolent language or behavior in the presence of a legislature or judicial body, tending to disturb its proceedings, or impair the respect due to its authority; or a disobedience to the rules or orders of such a body, which interferes with the due administration of law": 3 Am. & Eng. Ency of Law, 777.

Mr. Bishop, in his work on criminal law, introduces this subject with the following declaration: "No court of justice could accomplish the objects of its existence unless it could in some way preserve order and enforce its mandates and decrees. The common method of doing these things is by process of contempt": 2 Bishop's Criminal Law, sec. 243.

Counsel cites, in support of the proceedings, the law as laid down by Blackstone. This eminent commentator on the law of England gave his works to the world many years before the adoption of the constitution of the United States, and at a time when a censorship of the press was thought to be a proper office of government. It is well known that in his time the English courts assumed a much wider scope on the subject of applying the process of contempt to restrict the freedom of speech and publication than in more recent times. And yet this proceeding cannot be supported by citations from Blackstone without culling from his text the most general observations. The case of *Territory v. Murray*, 7 Mont. 251, is cited in support of this proceeding. That case, we think, has no application to the case at bar. The offender in that case was a suitor before the court. It appears that he concocted a scheme, and invented a fictitious set of facts, in relation to

the very case under adjudication, in which he was a party. He caused to be telegraphed a statement of the fictitious and alleged events which he had conjured into apparent existence, and caused the same to be published so as to get it communicated to the attention of the court; and it was clear that he did all this to cause an impression upon the mind of the court which he thought would work to his benefit in the litigation wherein he was interested. That case, it seems to us, ought not to have misled either court or counsel in the case at bar. The publication in the Murray case was put out of consideration, the court observing that the offender had used the press to communicate to the court the fictitious matter which he had concocted, and which he hoped would have an influence. The court passed by the publisher, and turned its attention to the offending suitor. A review of authorities shows clearly that a suitor is held to a stricter accountability for his conduct than parties in no way connected with the litigation.

It is not to be understood that this court approves the propriety of publishing comments of the nature contained in the article in question. We are passing upon a question of law, as between the rights of a citizen and the power of a court to summarily imprison upon a charge of contempt. It is from this point of view that we are considering the publication, and the proposition to punish therefor. The article in question contains expressions concerning a state of influence and feeling. As before observed, the object of the power to punish by process of contempt is to enforce obedience and respect to the authority of the court. For this purpose the power is given, and to this purpose the power is limited. It is not to enforce sentimental respect. That must be gained by other means, and will flow ungrudgingly from a generous and law-abiding people to that court where law and justice is administered with able, fearless, and impartial fidelity. The power to punish for contempt being given to preserve proper order within the precincts of the court; to silence and remove those disturbing elements which interfere with or interrupt the due and orderly progress of judicial business; to disarm and punish disobedience or resistance of the lawful authority of the court, — we scan the acts charged and admitted in the case at bar, to see wherein they run counter to this authority of the court. It is clear that the publication of the views expressed as to bias in no way interrupts the orderly progress of the said

court in its adjudications; at least, no such effect had been suggested, and it does not appear in the nature of the comments. The authority of the court is bowed to with unhesitating submission, even by the party bold enough to publish the comments in question. Sometimes courts have interposed to prevent publication of matter in reference to the merits of cases pending, and which seems to have a prejudicial influence thereon. But in the case at bar nothing was said in relation to the merits of the case or the litigants, tending to prejudice. We do not understand that the suggestion that the judge of a certain court, or the people of a certain place, are biased in their view of a certain case in litigation, would make them biased or more biased. Conceding that would be near conceding the charge of bias already. If the assertion that there is a bias subjects to punishment for contempt, then how would those who make application for a change of venue on that ground, and those who asserted bias, and the facts which support the assertion, escape? Such is not the law, because that character of assertion does not interfere with the authority of the court. It follows, then, that this character of assertion stands in that broad field covered by constitutional sanction of the freedom of speech and press. What was the purpose of this constitutional guaranty? Was it to grant freedom to ordinary speech and publication which could excite the resentment of no one? If that was the purpose, then it would be as needful to put into the constitution a provision that people may freely walk the streets quietly and peaceably. The history of the struggle for supremacy of certain principles and ideas shows the purpose of the law, when such principles or ideas are clothed with that force and dignity, and inscribed upon our constitution or statute. And so the history of the struggle for the establishment of the principle of freedom of speech and press shows that it was not ordinary talk and publication which was to be disenthralled from censorship, suppression, and punishment. It was in a large degree a species of talk and publication which had been found distasteful to governmental powers and agencies.

The people of this state did not omit that guaranty of freedom of speech and publication from their constitution, with the ordinary responsibility attached to the misuse thereof: Art. 8, sec. 10.

It is ordered that the prisoner be discharged.

**REVIEW OF JUDGMENTS FOR CONTEMPT BY CERTIORARI:** See cases cited in note to *Mullin v. People*, 15 Col. 437; 22 Am. St. Rep. 414; also *Lindsay v. Clayton District Court*, 75 Iowa, 509; *Currier v. Mueller*, 79 Iowa, 316. The codes which provide that witnesses shall "answer questions legal and pertinent to the matter at issue" have merely embodied the well-recognized common-law rule that the evidence shall be relevant and material. A question is properly excluded when the answer to it could not have been material: *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143; 82 Am. Dec. 201.

**CONTEMPT OF COURT BY COMMENTS IN NEWSPAPERS:** See note to *Ex parte Barry*, 85 Cal. 603; 20 Am. St. Rep. 248, and cases cited. This California case, and that of *Myers v. State*, 46 Ohio St. 473, 15 Am. St. Rep. 638, seem to be opposed to the principal case in regard to the extent of the license of speech permissible in commenting on pending actions, though there is no material difference in the statutes on which the several decisions were based. As the court does not refer to any of the decisions in other states, it is to be presumed that it did not approve of those decisions, but preferred to frame a more liberal rule. The extent to which the freedom of criticising the proceedings of courts during the pendency of actions should be tolerated is a question which is, in no small degree, one of public policy, and on such a subject different views will prevail in different states. But the principal case allows an amount of license which we think passes the limits fixed in other jurisdictions, and which it will probably be found difficult to reconcile with the necessity of preserving the respect due to the courts.

The same court decided in *In re Shannon*, 11 Mont. 67, that comments upon past abuses in the administration of justice in a certain court, and not referring to any particular case adjudicated by the magistrate incumbent at the time of publication, is not punishable as contempt, — a ruling which recognizes the distinction generally made between criticism of pending cases and the conduct of the magistrate as a whole.

## BANK OF COMMERCE v. FUQUA.

[11 MONTANA, 285.]

**APPELLATE PRACTICE.** — AN APPEAL MAY BE TAKEN FROM PART OF A JUDGMENT under a statute authorizing an appeal from a judgment, or any part thereof.

**APPELLATE PRACTICE.** — AN ORDER STRIKING OUT A PART OF AN ANSWER is reviewable upon appeal from a final judgment, though no formal bill of exceptions has been presented or settled.

**ATTORNEY'S FEES, RIGHT TO RECOVER.** — STIPULATION IN A BILL OF EXCHANGE that the parties thereto agree to pay all attorney's fees in case of suit on this paper entitles the holder of the bill to recover for such fees in an action brought to enforce payment of the bill. It is not necessary for him to resort to an independent action for that purpose.

**CONFLICT OF LAWS.** — A CONTRACT VOID BY REASON OF THE LAWS OF THE STATE WHERE IT WAS MADE and is to be performed is generally void elsewhere.

**PLEADING STATUTE OF ANOTHER STATE.** — One relying upon a statute of a state under which a contract was made, as a defense against its enforce-

ment, should set out, at least substantially, the statute on which he relies. The law must be averred and proved in the same manner as any other fact. An averment that by a statute of the state wherein the contract was made only \$2.50 is allowed for an attorney's fee in such a case, and that a contract for a greater sum for attorney's fees is by the laws of that state illegal and void, is not a sufficient pleading of the statute upon which defendant relies.

**NEGOTIABLE INSTRUMENTS — ATTORNEY'S FEES. — AGREEMENT IN A BILL OF EXCHANGE** to pay all attorney's fees in case of suit thereon is not usurious, nor against public policy, and is therefore enforceable.

**NEGOTIABLE INSTRUMENTS. — STIPULATION IN A BILL OF EXCHANGE** to pay all attorney's fees in case of suit thereon does not destroy its negotiability.

*T. E. Crutcher*, for the appellant.

*Henry G. McIntire*, for the respondent.

**HARWOOD, J.** The bill of exchange sued on in this action was drawn for the principal sum of four thousand dollars, and provided for interest at six per centum per annum after maturity until paid, and that "the parties hereto agree to pay all attorney's fees in case of suit on this paper." The defendants, one of whom is appellant, were, according to the allegations of the complaint, both acceptors and indorsers of said bill of exchange.

Judgment was rendered against appellant, G. W. Crutcher, one of the alleged acceptors and indorsers, for the said principal sum of four thousand dollars, together with four hundred dollars for attorney's fees for services in prosecuting the action, and costs of suit. This appeal is from that portion of the judgment relating to attorney's fees allowed in said action.

Respondent contends that an appeal from part of a judgment is not proper practice, and cites in support of his position the case of *Barkley v. Logan*, 2 Mont. 296, determined at the August term, 1875, and the case of *Plaisted v. Nowlan*, 2 Mont. 359, determined at the January term, 1876, of the supreme court of Montana, in which latter case the former was again considered on motion for rehearing, and affirmed. These cases would support respondent's position but for the fact that since the determination of them the statute under which they were determined has been so amended as to provide for an appeal from the judgment, "or any part thereof." The sections of the statute (369 and 380) referred to in the cases cited are as found by the civil practice act, enacted by the seventh session of the legislative assembly, convened in 1871. Now, in 1877, about one year following the announcement of the

decisions cited *supra*, the Code of Civil Procedure was revised by the legislative assembly at the tenth session thereof, and the same sections again appear in the code as sections 408 and 431 (10th Sess. Laws), and in the latter section appears the additional words "or any part thereof," making the section read: "An appeal may be taken to the supreme court in the following cases: 1. From a final judgment, or any part thereof, entered in an action or special proceeding commenced in those courts, or brought into those courts from other courts." The statute has since remained in that form. We therefore hold that an appeal may be prosecuted from part of a judgment: See *In re Davis's Estate*, 11 Mont. 1. In California, under statutes very similar, the practice is to entertain an appeal from part of a judgment: Hayne on New Trial and Appeal, sec. 185, p. 562.

Appellant, G. W. Crutcher, as a defendant in said action, appeared, and answered said complaint, and among other averments set forth two paragraphs, as follows: —

"4. This defendant, for answer to the seventh paragraph of said plaintiff's complaint, alleges that said attorney's fees in said suit provided for were not due at the time this suit was filed.

"5. And for further answer to said seventh paragraph he alleges that the bill herein sued on was, as alleged in said complaint, made in the state of Kentucky, and payable in that state, and said contract was to be wholly performed in that state, and that by the laws of the state of Kentucky the sum of \$2.50, and no more, is provided for by the statutes of the said state of Kentucky in such cases, and that any contract for a greater sum as attorney's fees is, by the laws of said state of Kentucky, illegal and void, and that no greater sum than \$2.50 can be recovered in said state under the contract set out in the complaint herein."

These paragraphs plaintiff's counsel moved the court to strike out of said answer, on the ground that the averments therein contained were sham and irrelevant allegations, and constituted no defense to plaintiff's complaint. The court sustained said motion, and struck from the answer said paragraphs 4 and 5.

The said motion and order appear in the record, and the appellant complains that the court erred in said proceedings; but respondent interposes the objection that said proceedings of the court below are not properly before this court for review

on appeal from the judgment, because, as he contends, said motion and the order of the court thereon are not part of the judgment roll. This objection leads into a region of practice much debated by the profession and bench in this jurisdiction, commencing with the case of *Noteware v. Sterna*, 1 Mont. 314, and running through a number of decisions, which discussion, perhaps, as intimated by the learned judge in *Barber v. Briscoe*, 8 Mont. 214, has tended rather to entangle and obscure the region than to trace plain paths through it. If this be true, it warns us to look well to our bearings from the standpoint of statute and principle when we enter here. It may have so appeared, with much reason for it, to Justice Liddell, in treating that case; but with the opinion in that case, and the statute, we do not view the point with so much embarrassment, nor need we dwell long upon it. In the opinion just cited, section 290 of the code, which prescribed what matters shall be deemed excepted to,—i. e., what proceedings of the court the law reserves an exception to in favor of the party desiring to have the same reviewed,—was first considered. It is then observed: "When we come to examine the matters which are deemed excepted to, it will be seen that there are two kinds,—those orders, decrees, and rulings which appear upon the face of the pleadings; and the other is of that class where the decision, order, or ruling is based upon evidence *dehors* the pleadings." And again: "The mere fact that the law has reserved an exception will not avail a party any more than if he had not excepted, unless the grounds and reasons, with so much of the evidence as is necessary to explain the point, be embodied in a bill of exceptions properly settled and signed, as is required by the Code of Civil Procedure. . . . We have two lines of authorities, . . . founded upon the distinction above stated, perfectly in accord with the strict letter of the statute, and in conformity with the California authorities on the same subject. The second paragraph of section 306 of the Code of Civil Procedure defines what shall constitute the judgment roll, specifying the summons, pleadings, verdict, or findings of the court, commissioner, or referee, all bills of exceptions taken and filed in said action, and copies of orders sustaining or overruling demurrers." The Montana cases are then reviewed, and it is further said: "From these cases it appears that when the order, decision, ruling, or other matter deemed excepted to by law is apparent upon the face of the pleadings, no formal bill of exceptions is necessary in order to

have the ruling reviewed on appeal based upon the judgment roll."

The correct distinction upon this point of practice appears to be there expressed, and in our view, that case goes far towards reconciling the two lines of Montana cases which are mentioned as being wholly at variance.

In the case at bar the judgment roll is brought here on appeal from the judgment, and we are asked to review an order striking out a portion of appellant's answer. This order is deemed excepted to by the provisions of section 290 of the Code of Civil Procedure. It is provided by section 306 of the code that the judgment roll shall include, among other papers, all pleadings and copies of orders sustaining or overruling demurrers. Now, a motion to strike out a portion of a pleading is in fact and in substance a demurrer to that portion attacked. This motion is used to trim off and cast out improper matter inserted in a pleading which contains proper averments, while the demurrer is made use of to root up and cast out the whole pleading at which it is directed: Bliss on Code Pleading, 2d ed., sec. 423. Such a motion being of the nature of a demurrer, which is part of the judgment roll, and the order sustaining the same being deemed excepted to, it is held reviewable on appeal from the judgment. In the case of *Dodson v. Nevitt*, 5 Mont. 518, a motion was made to strike out a counterclaim set up in the answer, and sustained. This proceeding was held reviewable on an appeal from the judgment, on the ground that such motion was in the nature of a demurrer.

Was the action of the court in striking out said paragraphs 4 and 5 erroneous? As to paragraph No. 4, we unhesitatingly deem it sham, and without force as a defense. The language of the clause in the bill of exchange as to attorney's fees is: "The parties hereto agree to pay all attorney's fees in case of suit on this paper." Appellant reasons that this is a promise of a certain sum upon the happening of a contingency, and until that contingency happens, and the attorney's fee is earned, by prosecuting the action to judgment, there is nothing to pay, and that such fee cannot be recovered in the same action. It seems to us that the contingency for the employment of an attorney arose when default was made in the payment of said bill, at the time and place of payment expressed therein; and that the attorney's fee, if lawful to be charged, was earned when judgment was obtained, and was proper to



be allowed therein. It was incidental to the enforcement of said debt by suit, and was a proper part of the collection to be made in the same suit, if lawful at all.

Paragraph No. 5 of the answer is an attempt to plead a statute of the state of Kentucky, and also, as we are informed by appellant's counsel, the construction of such statute by the courts of that state. Does that paragraph accomplish the purpose intended? It is a rule of the law relating to contracts, with but few exceptions, not applicable in this case, that if a contract is void by reason of the laws of the place where the same is made and is performable, the same rule will be applied by the courts of another state where such contract is sought to be enforced, although such contract is not obnoxious to the laws of the latter jurisdiction: 2 Parsons on Contracts, 582; 2 Parsons on Notes and Bills, 317; Story on Bills, sec. 129; 1 Story on Contracts, sec. 802; Bishop on Contracts, enlarged ed., sec. 1390.

But in order to have such foreign law applied in another jurisdiction, it must be brought to the attention of the court by setting out so much thereof as is applicable, and proving the same. This is the rule at common law (1 Chitty on Pleading, 239), and it does not appear to have been changed by the codes: Bliss on Code Pleading, 183, 184, 304. The case of *Throop v. Hatch*, 3 Abb. Pr. 23, being directly in point, and the language so appropriate to this subject, we quote a few observations therefrom. The court, by Allen, J., says: "If the plaintiff is driven to the statute laws of the states of Ohio and Michigan to maintain this action, and bound to show that by the statutes of those states the trusts which he seeks to enforce are valid, he should have set out, at least substantially, the statutes upon which he relies. The laws themselves are to be averred and proved in the same manner as other facts, and their existence is to be proved by copies of the statutes, properly exemplified as other documents are. The averment that the trusts are, by the laws of the states in which the lands are situated, valid and subsisting trusts, is therefore nothing more than an averment of the conclusion of the pleader, based, — 1. Upon his knowledge of the existence of certain statutes; and 2. Upon his construction of those statutes." The following cases hold to the same effect: *Phinney v. Phinney*, 17 How. Pr. 197; *Carey v. Cincinnati etc. R. R. Co.*, 5 Iowa, 357; *Devoss v. Gray*, 22 Ohio St. 159; *Swank v. Hufnagle*, 111 Ind. 453; *Central Trust Co. v. Burton*, 74 Wis. 329; *Sells v. Haggard*, 21

Neb. 357; *McLeod v. Conn. etc. R. R. Co.*, 58 Vt. 727. In the case at bar the pleader alleged that by the statute of Kentucky \$2.50 only is allowed as a fee to an attorney in such a case, and "that a contract for a greater sum as attorney's fees is, by the laws of said state of Kentucky, illegal and void." This is an allegation of the pleader's conclusion as to what the statute of Kentucky provides in this respect, but what that law is in terms is not set forth. The court, therefore, properly granted the motion to eliminate from the answer that averment. And the party, having failed to avail himself of the opportunity offered by the court to amend his pleading, has lost the benefit of the provision of the law of Kentucky (if there is such a law) applicable to the bill of exchange, which it appears was made there, and was by its terms payable there.

Independently of the question as to what the law of Kentucky is, and its effect upon the stipulation in said bill for the payment of attorney's fee, appellant contends that said provision ought to be held invalid here, on the ground that such a stipulation in a contract is obnoxious to sound public policy, and in support of this position cites cases from certain states. and also the case of *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662, decided in the United States district court for the eastern district of Arkansas, by Judge Caldwell, and concurred in by McCrary, J. Respondent meets this proposition by the citation of a line of cases from the courts of last resort in other states of the Union, and also finds support for his side of the proposition in the federal courts, in the case of *Wilson S. M. Co. v. Moreno*, 7 Fed. Rep. 806, decided by the circuit court for the district of Oregon, per Deady, J.; and also the case of *Howenstein v. Barnes*, 5 Dill. 482, decided in United States circuit court, Kansas district, in 1879, per Foster, J., cited and commented on in note to *Witherspoon v. Musselman*, 29 Am. Rep. 406; also the case of *British Bank v. Ellis*, 6 Saw. 96, decided by Judge Deady in the circuit court, district of Oregon. We are also cited to 1 Randolph on Commercial Paper, sec. 205; 1 Daniel on Negotiable Instruments, sec. 62; the able notes by Mr. Hamilton, appended to the case of *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662; and also the valuable note by Mr. Brown, reporter, appended to the case of *Witherspoon v. Musselman*, 29 Am. Rep. 406. We deem it unnecessary to cite the cases which can be collected in support of the different views of this subject, because this has been ably done by the com-

mentators, editors, and annotators referred to, whose works are readily accessible to those desiring to investigate the subject. It will be seen by a study of the cases that during the past twenty years a vigorous examination of this interesting question relating to commercial law has been going on in the courts of this country, which has resulted in no harmony of conclusions. The subject has been so critically and thoroughly treated from every point of view, there remains very little original to be said thereon.

In the fourth edition of Daniel on Negotiable Instruments, published this year, the author divides the cases upon this subject into four classes, as follows: First, those which sustain the validity of the stipulation and the negotiability of the instrument. The second class of cases enforces the stipulation, but denies the negotiability of the instrument. The third class maintains the negotiability of the instrument, but denies validity to the stipulation, because, as those cases hold, it amounts to a penalty, tends to encourage litigation, is oppressive to debtors, and is against the policy of the law, and therefore void. The fourth class of cases holds that the stipulation renders the transaction usurious, and subjects the instrument to the operation of the statutes against usury.

Under each of these heads a group of cases will be found noted by the author.

We will briefly refer to the grounds upon which the stipulation in the bill before us would, under any group of such decisions, be held void, or held to otherwise affect the instrument as negotiable paper; and herein we commence with the fourth class, and follow in order back to the first, where it would be held valid, and in no way vitiate the character of the obligation as a negotiable instrument.

The fourth class treats the stipulation as a condition which renders the transaction usurious. While in this state there is at present no law which would be infringed on that particular ground, we do not subscribe to the reasoning whereby it is assumed that the stipulation is a device to evade the law against usurious interest. We are inclined rather to adopt the reasoning of Judge Deady upon this point. He says: "The ruling that such stipulation makes the note usurious is founded upon the unauthorized assumption of fact that the sum agreed to be paid as an attorney's fee in case the note is not paid at maturity is not what it purports to be, but illegal interest in the disguise thereof. Of course, where it appears that such is the

real nature of the transaction, it should be treated accordingly. But the fact cannot be assumed, any more than that a like sum of the alleged principal is illegal interest in disguise. Accordingly, the tendency of the decisions hostile to this stipulation is to leave these untenable grounds, and hold it void upon the ground that it is a convenient device for usury, and tends to the oppression of the debtor."

In the case at bar the stipulation is to pay attorney's fees in the event of suit "on this paper," and from that point of view we are considering the objection that a court where usury laws prevail might assume that the provision was a device to evade such laws. Now, how would a creditor obtain, through such stipulation, a greater sum for the use of money than the law permits? The debtor in such a case may pay the amount of the principal and the lawful interest, and then the stipulation would be null, for no suit could be maintained on the obligation, and of course no sum collected from the debtor by way of attorney's fee. But in order to carry out the scheme to evade the law against usury, and enable the holder of the paper to collect more than the law allows for the use of money, the debtor must collude against his own interest in a case where he is in no way bound so to do, and default in the payment of the obligation, so as to give effect to the stipulation for attorney's fees, and suffer such fees and other costs of suit to be enforced against him. Moreover, the creditor, in order to profit from this proceeding, must obtain from the attorney a portion of the fee allotted to him for his services at the end of the suit; and where the stipulation is such that reasonable compensation only is allowable, this method to avoid the law against usury involves the further proposition that the attorney will divide the reasonable fee allowed for his services with the would-be usurer. If that would be the practical working of this method to evade the laws against usury, the assumption that the stipulation is made for that purpose, or could be used for that purpose, involves the assumption that human nature is so changed that men will connive against their own interests, and aid and abet the perpetration of wrongs against themselves, without the slightest coercion, and voluntarily use the law which was made for their protection to work to their injury. It has been a maxim sanctioned by the experience of men from olden time, that the presumption is, that when a man acts voluntarily he will not act against what he knows to be his own interest. If the stip-

ulation was for a certain sum or per centum for attorney's fees, which was grossly out of proportion to the value of the services, it might well be looked upon with suspicion in connection with laws forbidding usurious charges for loan of money. But where a reasonable attorney's fee is provided for, dependent on the event of suit for collection of the debt, and such fee is allowed for such services actually performed, where judgment is recovered, we cannot perceive how the usurer could profit by it. So in cases where the stipulation is that the debtor will pay expenses of collection, without making it dependent on the event of a suit, the whole proposition is changed. Under such a condition, demands might be put forth which a court might look upon as incompatible with the provisions of law against usury. But, as remarked by Judge Deady, is it not an unauthorized assumption for a court to presume that the stipulation is made to evade the law against usury, without any showing to that effect? As he says, it would be as proper to presume that part of the principal is usury in disguise, without any showing to that effect: *Wilson S. M. Co. v. Moreno*, 7 Fed. Rep. 806.

The third class of cases on this subject as classified by Mr. Daniel maintains the negotiability of the instrument, but holds that the stipulation is penal and void. This group of cases is closely allied to those cited under the fourth class, and the reasons affirmed in both are very much alike, except that some cases of the third class do not proceed upon the ground that statutes against usury are infringed by the stipulation, but without the aid or supposed aid of statutes declare it void on the ground that it encourages litigation, is oppressive to the debtor, and is therefore against the policy of the law. These, with other considerations, were summarized in the case of *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662, as ground for holding the stipulation, on general principles, without reference to statute, void. In considering the question from this point of view, it should be borne in mind that it is a stipulation of contract between parties which the court is asked to declare void, and as one ground therefor, the obligor urges that it is oppressive. Now, courts of equity even do not declare a contract void merely because it is inexpedient or improvident: 2 Pomeroy's Eq. Jur., sec. 928. Nor do we find this provision of the instrument bearing a likeness to those contracts which the law generally condemns as against public policy (Bishop on Contracts, enlarged ed., secs. 467-549),

unless it be considered champertous, and we have not seen that view seriously urged.

If this stipulation could be referred to any class of contracts which have been held contrary to public policy by a long line of decisions, and fit to the principle carried out in such cases, there would be more support to that view. It is not against public policy nor against the spirit of the law in these times that attorneys should receive just and reasonable compensation for services. Nor is it in principle unlawful for one to contract with another to reimburse the latter for a lawful expenditure caused by the default or wrong committed by the promisor. If the main obligation is valid, and the obligor can pay it, without question he should do so at maturity; and it would seem merely stubborn denial of another's right to compel the obligee to go into court to enforce payment, and suffer the delay, inconvenience, and expense of such proceeding. Now, the parties have provided for this condition of things in part by a stipulation in the instrument that in such event, if the obligee is driven into court by the default of the obligor, the latter shall pay a reasonable attorney's fee for the prosecution of the action. This has been held void as against public policy, because it is oppressive to the debtor. We cannot see on what principle it should be so held. In such a case, as just stated, the oppression is the other way, — it proceeds from the party who has borrowed the other's money or got his goods, and refuses to pay for the same when he is able so to do. But it may be said that, in the event the debtor's circumstances are such that he cannot repay the debt when due, it would be oppressive to have judgment recorded against him for the amount and attorney's fees. In such a case a judgment against one, which cannot be enforced, will be poor satisfaction for what the obligor received in consideration for the note; and in such case he may offer to confess judgment without action, at the maturity of the note, and then it is not at all likely judgment would be given for attorneys' fees, if that was shown.

It is not uncommon to allow reasonable attorney's fees in case of foreclosure of mortgage: See cases cited in note to *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662, to which we add the case of *Clark v. Nichols*, 3 Mont. 372. And such a condition does not appear to have received the attacks upon it which have been aimed at the same condition in a negotiable obligation without mortgage. It is hard to see why,

viewed from the stand-point of public policy, the stipulation is not as obnoxious in one kind of an obligation as another. Besides, the mortgage is only collateral to the obligation to insure the payment thereof; and its enforcement is sometimes more oppressive to the debtor than a naked promise to pay, because the mortgage often takes property otherwise exempt from execution.

But will the stipulation encourage litigation? Viewed from one side it will not. The debtor will not do anything to encourage the bringing of an action against himself, which involves his payment of a greater sum than would be called for without action. He will discourage that result, and to do so he will see that his obligation is satisfied or extended. Is there any real motive for the creditor to unduly hasten into court with his note or bill of exchange, simply because his debtor would be required to pay the attorney's fee? — a matter from which the creditor could personally gain nothing. Would he decline to grant reasonable extension to a solvent debtor, who was at the time unprepared to meet his obligation, and hurry into court for the sole purpose of wrenching from the debtor an attorney's fee? We do not believe that experience shows that these results follow. The bill before us found its way into court several months after its maturity, and the complaint avers that the payees had often been requested to pay the same, and this is not denied.

We come now to the second class of cases, which enforces the stipulation, but denies negotiability to the instrument: See cases cited under this head in 1 Daniel on Negotiable Instruments, sec. 62.

It is already perceived that those opposed to the stipulation are much divided among themselves in their views of its effect. The cases in this second class proceed upon the ground that although the stipulation is valid as a condition, it is a condition incompatible with the nature of negotiable instruments, because it introduces an element of uncertainty as to the amount to be called for thereon. It has been pointed out by the commentators cited *supra* that where the stipulation for an attorney's fee is dependent on the event of an action to enforce payment, the amount demandable at maturity is not at all affected thereby; and that when suit is brought, and it is sought to enforce the stipulation along with the principal and interest of the note or bill, it is past due, and has ceased to be a negotiable instrument, in the full meaning of that term.

This is readily perceived by every jurist, and this suggestion seems to take away much of the force of the idea that the stipulation introduces an element of uncertainty into the instrument, which, as a negotiable instrument, it is unable to carry. In the case of *Merchants' Nat. Bank v. Sevier*, 14 Fed. Rep. 662, Judge Caldwell, in touching upon this view of the stipulation, says: "If a stipulation for an attorney's fee can be upheld upon the ground that it is a valid agreement upon sufficient consideration for the payment of a liquidated sum, it is not perceived why a stipulation to pay the taxes of the payee, or his office rent, or the salary of his collector, or all of these and as many more as the genius of a rapacious creditor may devise, should not be upheld and enforced by the same mode of reasoning. Mr. Justice Sharswood, in *Woods v. North*, 84 Pa. St. 407, 24 Am. Rep. 201, following Chief Justice Gibson, characterizes such a provision as 'luggage,' which negotiable paper is unable to carry, and pertinently inquires: 'If this collateral agreement may be introduced with impunity, what may not be?' In Daniel on Negotiable Instruments, 49, it is said this inquiry is answered by the assertion that such provisions facilitate rather than encumber the circulation of such instruments; they are not 'luggage,' but ballast. Mr. Daniel's assertion is in the teeth of many adjudged cases, among which are well-considered judgments of such eminent jurists as Chief Justice Gibson, Mr. Justice Sharswood, and Mr. Justice Cooley." With great deference so these able jurists, for whose opinion we entertain profound respect, we think there is a difference between the stipulation for attorney's fee in the event of suit and a stipulation to pay taxes, office rent, collector's salary, horse hire, etc. The first stipulation depends upon the event of a suit after default of payment, and after the paper has ceased to be currently negotiable. While the paper is negotiable, and up to the very moment of instituting suit, the amount demandable thereon is exact and certain. The other class of demands mentioned would be of a character which in their nature would render uncertain the sum to be demanded by the holder at maturity, and therefore an instrument containing such stipulations, by reason of the uncertainty of the sum to be called for at maturity, may well be held not to be a negotiable instrument. But no such stipulations are in the instrument before us, nor did the instrument sued on in the case last cited contain them.

We think, on the whole consideration, that the cases cited



in the first class by Mr. Daniel, which sustain the validity of a stipulation for attorney's fee in the event of a suit and the negotiability of the instrument, are the most consistent with the principles of law in general, and with those special rules governing negotiable instruments. And we approve the view of Judge Deady, in *Wilson S. M. Co. v. Moreno*, 7 Fed. Rep. 806, that the attorney's fee, under such stipulation, in the event of suit, is incidental thereto, in the nature of costs, and as such is just and proper; and that the stipulation should be such as to leave the question of the reasonableness of the demand for services actually rendered within the supervision and control of the court.

Judgment is affirmed, with costs.

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A BILL OF EXCEPTIONS IS NOT THE PROPER MEDIUM through which to certify to an appellate court matters which must necessarily be a part of the original record, if they exist at all: *New Orleans etc. R. R. Co. v. Albritton*, 38 Miss. 242; 75 Am. Dec. 93. According to this rule, not only was it not necessary to set out the error complained of in the principal case in a bill of exceptions, but the appellate court would have been bound to disregard such a method of bringing it before them.

STIPULATION FOR ATTORNEYS' FEES IN PROMISSORY NOTE. — A discussion of the vexed question whether a stipulation of this kind destroys the negotiability of a note will be found, together with a list of the authorities on both sides, in the opinion of the court in *Montgomery v. Crosthwait*, 90 Ala. 553; 24 Am. St. Rep. 832. See also note to *Witherspoon v. Musselman*, 29 Am. Rep. 406.

A CONTRACT VOID OR ILLEGAL by the law of the place where made is void everywhere: *Ivey v. Lalland*, 42 Miss. 444; 97 Am. Dec. 475; *Ford v. Buckeye State I. Co.*, 6 Bush, 133; 99 Am. Dec. 663; *Forepaugh v. Del. etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672.

PLEADING FOREIGN STATUTES. — As to the necessity of setting out in the pleadings the law of a foreign jurisdiction, upon which a claim is based, see *Gunn v. Howell*, 27 Ala. 663; 62 Am. Dec. 785. Such laws must be proved as facts: *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439; 10 Am. St. Rep. 67; *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400. In the absence of evidence that the law of the foreign state is different, it will be presumed to be the same as that of the domestic jurisdiction: *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; *Osborn v. Blackburn*, 78 Wis. 209; 23 Am. St. Rep. 400. And if a single section of a foreign code is read in evidence, the court will look to the whole code to ascertain what the law is: *Ex parte Spears*, 88 Cal. 640; 22 Am. St. Rep. 341.

AGREEMENT TO PAY ATTORNEY'S FEE, inserted in a note, does not render it usurious: *Williams v. Flowers*, 90 Ala. 136; 24 Am. St. Rep. 772.

## HARRIS v. LLOYD.

[11 MONTANA, 390.]

**JURY TRIAL.** — IN A SUIT IN EQUITY, where there is a finding of facts by a jury and also by the court, the latter is as conclusive as if no jury had been impaneled in the case.

**A MEMBER OF A MINING PARTNERSHIP** has a right, without consulting his associates, to sell his interest in the partnership to a stranger, or to purchase the interest of one of his associates without informing the others, or permitting them to share in the benefits of his purchase.

**MINING PARTNERSHIPS.** — THERE IS NO RELATION OF TRUST AND CONFIDENCE between tenants in common who had been partners in the development of lode mining claims, in the absence of a special contract, which prevents one from demanding and receiving more for his interest in the property than is paid therefor to his co-owners.

**PRACTICE.** — A FINDING OUTSIDE OF THE ISSUES will be disregarded.

**MINING CO-TENANTS, AND THEIR RIGHT TO SWINDLE ONE ANOTHER.** — Where persons who are co-tenants of a mine, who have invested their funds in its development, join in a contract of sale made for a consideration expressed therein, and one of them, without the knowledge of the others, but without misrepresentation to them other than that involved in his joining in such contract, receives from the purchaser a sum much greater than that for which his co-tenants understood the mine to be sold, they cannot, in a suit in equity, compel him to account to them for such excess.

*Robinson and Stapleton, and Forbis and Forbis*, for the appellants.

*John T. Baldwin, and Cole and Whitehill*, for the respondents.

BLAKE, C. J. This action was brought to recover a judgment for the sum of fifteen thousand dollars on account of the sale of certain lode mining claims to Thomas Couch, and for the sale of property which had been conveyed by Couch to the Boston and Montana Consolidated Copper and Silver Mining Compaay. No general verdict was requested by the court or any of parties, and the jury returned the following special findings: —

“The jury in the above-entitled action will find a special verdict by answering the following questions: 1. Were the plaintiffs and the defendant John Lloyd engaged jointly in working and developing the mines mentioned in the complaint, known as the ‘Harris and Lloyd tunnel property,’ from the year 1879 or 1880 to on or about the month of March, 1888? A. Yes. 2. If you answer the foregoing question yes, were they working the said mines with a view of extracting ores and selling the property? A. Yes. 3. Did the owners

interested in said property, while so jointly interested, do and perform work and labor and expend money of the total value and amount of about twenty thousand dollars? A. Yes. 4. Did they each contribute a proportionate share in the expenses incurred in the working of such mining property? A. Yes. 5. Did they share proportionately in the profits and losses incurred or accruing from said work? A. Yes. 6. Did the defendant Lloyd and the defendant Couch enter into an agreement by which the defendant Lloyd was to receive thirty thousand dollars, in addition to the one hundred thousand dollars mentioned in the contract, lease, and deed? A. Yes. 7. Did the defendants Lloyd and Couch, or either of them, conceal from the plaintiffs the fact of the making of such agreement for the payment of thirty thousand dollars? A. No. 8. Did the plaintiffs know of such agreement for the payment of thirty thousand dollars to Lloyd until after said property was accepted and sold and the deed delivered? A. Yes. 9. Did the defendants Lloyd and Couch, or either of them, by acts or words, represent to or conceal from the plaintiffs during the negotiation for the sale of said property that the sum of one hundred thousand dollars was the entire consideration or purchase price of same? A. No. 10. Was said sum of thirty thousand dollars, mentioned in the agreement between defendants Lloyd and Couch, a part of the consideration and purchase price of said mining property? A. Yes. 11. Did the defendants Couch and the Boston and Montana Consolidated Copper and Silver Mining Company have notice of the claim of the plaintiffs to one half of said thirty thousand dollars before twenty-two thousand dollars of said thirty thousand dollars was paid to said defendant Lloyd, or any other person? A. Yes."

The following findings were submitted by the court on its own motion: "1. Did John E. Lloyd, before or at the time that the contract and deed for the property were signed, inform the plaintiffs that he was to receive the additional thirty thousand dollars on the sale? A. No. 2. Did John E. Lloyd, in his negotiations with Couch, offer the entire property to him for the sum of one hundred and thirty thousand dollars or one hundred and fifty thousand dollars, and did Couch accept his proposition of sale, and agree to pay one hundred and thirty thousand dollars for the entire property? A. Yes. 3. If you find that John E. Lloyd negotiated and effected a contract of sale of the entire property, then answer if he had any

agreement with the plaintiffs to sell their interest for them, and if so, at what price? A. No. 4. Did the plaintiff and defendant John E. Lloyd, and the other owners in the mining property mentioned in the complaint, at any time before the contract for the sale of the same, enter into an agreement between themselves to sell the same for the benefit of all in proportion to their respective interests? A. No. 5. Did all the owners of the mining property in question have an agreement or understanding, and consent between themselves, by which all were to consent and agree together with reference to all matters touching their interest in the property before any action was done by any or all of them with reference to said property? A. No."

The two following special findings were requested by defendant, and also submitted to the jury: "5. Did the defendant John E. Lloyd, in any manner whatever, induce the plaintiffs to accept at the rate of one hundred thousand dollars for their interest in the property described in the complaint? A. No. 6. Did the defendant John E. Lloyd, at any time or at all, make any false representations to the plaintiffs, whereby they were induced to sign the contract with Thomas Couch for the sale of the property described in the complaint? A. No."

The court afterwards made its findings of fact and conclusions of law therein as follows: "This cause having been tried to a jury, which has returned special findings of fact in answer to requests submitted therefor, and having been submitted to the court, on motion of plaintiffs, for judgment and decree on the pleadings, evidence, and findings herein, the court, as chancellor, makes the following findings of fact, and accepts, confirms, and approves the findings of the jury in so far as their findings are embraced and herein included, and rejects and sets aside such of the findings of the jury as are not embraced herein; and any findings herein made which are not supported by the findings of the jury are made by the court of its own motion."

Facts found: "1. That the plaintiffs and defendant John E. Lloyd were, for a period of more than eight years prior to the month of March, 1888, co-owners and tenants in common, in the proportions mentioned in the complaint, of the mining property described in the complaint, and known as the 'Harris and Loyd tunnel property.' 2. That during all of said time they were engaged jointly in working and developing said

property, with a view of extracting ores, and of selling said property, and the owners did during said time jointly perform work and labor and expend money of the total value and amount of about twenty thousand dollars (\$20,000) thereon. 3. That they each contributed a proportionate share, according to their respective interests, in the working of said mining property during said time, and shared proportionately in the profits and losses incurred or accruing from said work. 4. That the above relations of the parties to each other regarding said property continued up to and existed at the time the contract of lease and sale mentioned in the complaint was entered into, although they had ceased work on said property some two or more weeks before that time. 5. That the defendant John E. Lloyd did, on or about the nineteenth day of March, 1888, and before the thirty-first day thereof, make a proposal to, and enter into an agreement with, the defendant Thomas Couch to sell to him all of the said property, and by which agreement the defendant Lloyd was to receive thirty thousand dollars (\$30,000) in addition to the one hundred thousand dollars (\$100,000) mentioned in the contract, lease, and deed, as he claimed, for signing the deed for his share and that of his brothers; which agreement for the additional thirty thousand dollars (\$30,000) was without the knowledge or consent of the plaintiffs, and which agreement he concealed from them. 6. The defendant Lloyd never informed either of the plaintiffs of the existence of said contract for thirty thousand dollars (\$30,000) additional at all; and the defendant Couch never informed either of them until the property was accepted and sold and the deed delivered, and they had no knowledge of the same until after said time. 7. That the defendant Lloyd represented to the plaintiffs, by signing the deed with them for the sum of one hundred thousand dollars (\$100,000), and the contract with Samuel J. Reynolds for two thousand dollars (\$2,000), that the sum of one hundred thousand dollars (\$100,000) was the entire consideration for the sale of said property. 8. That the defendant Lloyd effected the sale of said property, and the thirty thousand dollars (\$30,000) mentioned in the agreement between the defendants Lloyd and Couch was a part of the consideration and purchase price of said mining properties, and that the contract of sale executed to Couch by the owners was not made on behalf of the plaintiffs by Samuel J. Reynolds. 9. That the defendant Lloyd had no agreement with the plaintiffs, whereby he was to re-

ceive any consideration for making a sale of said property, or receive or retain said thirty thousand dollars (\$30,000) for his own use. 10. That the defendant Lloyd induced the plaintiffs to accept at the rate of one hundred thousand dollars (\$100,000) for their interests in the property described in the complaint. 11. That the defendant Lloyd, by signing the deed and contract, selling for the entire consideration at one hundred thousand dollars (\$100,000), and concealing the fact that he had an agreement for the payment of an additional thirty thousand dollars (\$30,000), induced the plaintiffs to sign the contract and deed with Thomas Couch for the sale and conveyance of the property described in the complaint. 12. That the defendants Couch and the Boston and Montana Consolidated Copper and Silver Mining Company knew of the interests and titles of the plaintiffs in and to said property at the time of the contract and purchase of the same, and had notice of the claim of the plaintiffs to one half of said thirty thousand dollars (\$30,000) before twenty-two thousand dollars (\$22,000) of said thirty thousand dollars (\$30,000) was paid to said defendant Lloyd or any other person. 13. That the findings requested by defendants, and not herein specifically found or passed upon, are found against them."

Conclusions of law: "From the findings of fact the court finds the following conclusions of law: 1. That at the time of the contract for the sale of the property described in the complaint by Lloyd and others to Couch, a partnership existed between the parties owning the property with reference thereto, — that is to say, between the plaintiffs and Lloyd *et al.*, — and they are entitled to share proportionately in the proceeds thereof. 2. That, being the co-owners and tenants in common thereof, they were entitled, under the circumstances, to share proportionately in the proceeds of the sale thereof, and such sale was for the benefit of all the owners. 3. That the plaintiffs are entitled to a judgment and decree as prayed for in their complaint or bill herein."

All the parties upon the trial conceded the right of the judge to treat the findings of the jury as advisory, and adopt or disregard any of them according to his conscience. Upon this hearing, however, the appellants contend that this power cannot be exercised under the constitution and laws of this state; but under these circumstances we decline to enter this field of research. We shall assume, for the purpose of this investigation, that the court below had the jurisdiction to act independently

of this verdict, and make its own findings of fact. We are therefore compelled to ignore the action of the jury, and confine our inquiry to the proceedings of the court. In *Stockman v. Riverside etc. Irrigation Co.*, 64 Cal. 57, Mr. Justice Ross for the court said: "It is insisted on behalf of the appellants, that as the findings of the court upon some of the material issues are contrary to the findings of the jury upon the same issues, this court should, notwithstanding a substantial conflict of evidence upon those issues, proceed to weigh the evidence, and decide whether it preponderates in favor of the findings of the court or of the jury. To this we cannot assent. The findings of fact by the court are as conclusive here as they would be if no jury had been impaneled in the case. The question for us is, whether there is sufficient evidence to sustain the findings of the court upon the material issues. . . . It has often been held here that the verdict of a jury in an equity case is but advisory to the court, and in this case it appears to have been the understanding between the parties that it was to be regarded in that light only": Hayne on New Trial and Appeal, sec. 234; *Freeman v. Stephenson*, 63 Cal. 499.

It is our duty to review the testimony, and determine whether the findings of the court are supported. After a careful examination of the record, we assert that the findings on which the judgment is founded cannot be upheld; and that at the time of the sale of the property, there was not a partnership between the owners by which the plaintiffs were entitled to receive their respective shares of the sum of one hundred and thirty thousand dollars.

The mining property which is described in the pleadings was owned and developed by the parties as tenants in common for the period of eight years prior to March 31, 1888. Each of these persons during this time paid his share of the debts which were incurred, and said John E. Lloyd was never the agent of any of the respondents, and had no authority to control or dispose of their interest. About two weeks after they had completed the work thereon, in March, 1888, and settled the expenses thereof, there was no contract for further mining or exploration. The owners then executed an agreement, whereby they covenanted to sell the property in consideration of the sum of one hundred thousand dollars. There is not a word in the testimony which tends to prove that the relations of these parties were of a fiduciary or any higher character than that of tenants in common of the property when this

agreement was entered into. The court below finds that said John E. Lloyd, by his fraudulent conduct and misrepresentations, induced the respondents to execute the instruments which have been referred to, and take their respective portions of the consideration of the sum of one hundred thousand dollars. When we weigh the opinion of the court as well as the facts in connection with the evidence, it is apparent that these deductions have been drawn, not from direct and positive testimony, but from the action of said Lloyd when signing, with his co-owners, said instruments, and his silence respecting his contract with Couch, whereby he was to receive the sum of thirty thousand dollars; in other words, the court has stated legal conclusions in the form of the facts arising from its view of the obligations of the parties as mining partners and tenants in common.

A leading case is that of *Matthews v. Bliss*, 22 Pick. 48, and Chief Justice Shaw, as the organ of the court, says: "The gist of the action was the conspiracy of the three defendants, after having agreed upon a sale of the brig at a large price, to induce the plaintiff's agent, by a concealment of the fact that the vessel could be sold for such price, and by false and fraudulent representations, to sell the plaintiff's quarter part of the vessel at a price much below that which they had so agreed to sell for. The court are of opinion that the direction of the judge who tried the cause was correct in stating to the jury that the mere non-disclosure of the fact, within their own knowledge, that they could sell and had agreed to sell the brig for a higher price, would not be sufficient to support the action, and that they were under no legal obligation to disclose that fact, and that withholding was not such a fraudulent concealment of the truth as would of itself maintain the action. The court are of opinion that the tenants in common of a vessel, who are not engaged jointly in the employment of purchasing or building ships for sale, do not stand in such a relation of mutual trust and confidence towards each other in respect of the sale of such vessel that each is bound, in his dealings with the other, to communicate all the information of facts within his knowledge which may affect the price or value. A different rule may prevail in respect to any contract for the use or employment of the common property, in which relation, perhaps, they may be deemed to place confidence mutually in each other; but, as in common cases of tenants in common of a vessel, they are independent of each other in all matters of



purchase and sale, and may deal with each other in the same manner as owners of separate property. Each may act upon the knowledge which he has without communicating it. But *aliud est tacere, aliud celere.*" This doctrine is approved by Mr. Bigelow in his work on fraud: 1 Bigelow on Fraud, 368.

There are some cases concerning the rights of tenants in common which do not affect the case at bar, although the respondents rely upon them. It is generally held that the purchase of a tax or outstanding title or encumbrance, or claim on the property by one tenant in common, inures to the benefit of all, although the decisions are not uniform in announcing the ground upon which this principle is founded. In *Hurley v. Hurley*, 148 Mass. 444, Mr. Justice Holmes cites many authorities to illustrate these distinctions, and says: "It will be found in most of the cases that the party setting up the tax title was under an obligation to pay the taxes. . . . There are strong grounds for saying that there were no special fiduciary relations between the petitioner and the respondent Daniel T. in this case. Their titles were in part derived from different sources."

In *Barnes v. Boardman*, 152 Mass. 391, Mr. Justice Devens said in the opinion: "The rule that when tenants in common are actually in possession, or are entitled to immediate possession, a purchase of an encumbrance on the common property will generally be deemed to have been made for the benefit of all, if they shall consent to pay their proportional shares thereof, and that to this extent a certain fiduciary relation exists between the tenants in common, is one that is sustained by many authorities: *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Flagg v. Mann*, 2 Sum. 486; 4 Kent's Com., 13th ed., 371, and cases cited; 1 Washburn on Real Property, 5th ed., 430, and cases cited." See also the cases cited in the note to *Barnes v. Boardman*, 152 Mass. 391, in 9 Law Rep. Ann. 571; *Venable v. Beauchamp*, 3 Dana, 321; 28 Am. Dec. 83, and note. The respondents insist that each of the co-tenants in lode-mining property must labor for his and their interests in the same degree, and that what he does for himself is for the common good. This position is not sustained by the courts, and the cases we have examined do not modify the doctrine of *Matthews v. Bliss*, 22 Pick. 48, relating to the rights of tenants in common in the sale of their interests in property. Their fiduciary relations are not created or enlarged if they become mining partners: *Bissell v. Foss*, 114 U. S. 252; *Kimberly v. Arms*, 129 U. S. 512.

In *Bissell v. Foss*, 114 U. S. 252, it is held that "there is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner of his share in the company assets and business to one or more of his associates, without the knowledge of the other associates." The statement of facts is lengthy, and must be omitted. In the opinion Mr. Justice Woods said: "The contention is, that these three parties were in such relations to each other that if one bought a share in the common property and business, it inured in equity to the benefit of all, subject to the payment by each of the associates of his share of the purchase-money. The relations from which this result springs are stated to be those,—1. Of joint tenants; and 2. Of partners; and that, by reason of these relations, Foss and Hunter became trustees for themselves and Bissell in purchasing the share of the Missourians. It is true that one of two or more tenants in common, holding by a common title, cannot purchase an outstanding title or encumbrance upon the joint estate for his own benefit. Such a purchase inures to the benefit of all, because there is an obligation between them, resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others: *Rothwell v. Dewees*, 2 Black, 613; *Van Horne v. Fonda*, 5 Johns. Ch. 388; *Lloyd v. Lynch*, 28 Pa. St. 419; 70 Am. Dec. 137; *Downer v. Smith*, 38 Vt. 464. But this rule cannot apply to Hunter and Foss. They purchased no outstanding title or encumbrance to the prejudice of the other tenant in common. They did what any tenant in common with entire good faith might do, namely, purchased the interest of some of their co-tenants without consulting the others. The title which they purchased of the Missourians was not antagonistic or hostile to the title of Bissell. Their purchase did not in any degree tend to injure or damage his interest. His share was just as valuable after as before the purchase, and his rights were the same. In such a purchase no trust or confidence is violated. Nor do we think that the relations of the parties as partners prohibited Foss and Hunter from making the purchase in question for their own benefit, to the exclusion of Bissell. The association of Bissell, Foss, Hunter, and the Missourians was not an ordinary partnership. It is what is known as a 'mining partnership,' which is a partnership *sub modo* only. . . . It follows, from these propositions, that one member of a mining partnership has the right, without consulting his associates, to sell

his interest in a partnership to a stranger, and that such a sale injures no right or property of the other associates. Much less does a purchase by one associate of the share of another inflict any wrong upon the other members of the partnership. There is no relation of trust or confidence between mining partners which is violated by the sale and assignment by one partner to a stranger, or to one of the associates of his share in the property and business of the association. It results as a conclusion from these premises that Bissell has suffered no wrong at the hands of either Hunter or Foss on the ground that they were his tenants in common or partners, by reason of any contract made between the latter in reference to the purchase of the share of the Missourians in their joint enterprise. There has been no violation of any trust and confidence arising from the relations existing between Bissell, Foss, and Hunter."

The same views were reiterated in *Kimberly v. Arms*, 129 U. S. 512, by Mr. Justice Field: "The case of *Bissell v. Foss*, 114 U. S. 252, does not seem to us to have any bearing on the subject under consideration. There the question was, whether a member of a mining partnership — that is, a partnership formed for the development and working of a mine — could acquire the shares of an associate without the knowledge of the other associates, and hold them on his own account; and the court held that it was lawful for him to do so. Mining partnerships or associations, whilst governed by many rules relating to ordinary partnerships, have some rules peculiar to themselves. One of such rules is, that a member may convey his interest or shares to another person without dissolving the partnership, and thus bring into it a new member without the consent of his associates; and may purchase interest in the same or any other mines, for his own benefit, without being required to account to the partnership for the property: *Kahn v. Smelting Co.*, 102 U. S. 641. The partnership between Arms and Kimberly was not a mining partnership, in the proper sense of that term. It was not a partnership for developing and working mines, but for the purchase and sale of minerals and mining lands, and in that respect was subject to the rules governing ordinary trading or commercial partnerships. It can no more be called a mining partnership than a partnership for the purchase of the products of a farm, and the lands upon which those products are raised, can be called a partnership to farm the land."

We have quoted extensively from the foregoing cases by reason of the eminence of the jurists who delivered the opinions, and the clearness with which the law has been expounded. Their applicability to the case before us can be seen without difficulty. They establish the proposition, that, in the absence of a special contract, there is no relation of trust or confidence between tenants in common, who had been partners in the development of lode-mining claims, which prevents one of them from demanding and receiving a higher sum for his interest in the property than is paid therefor to his co-owners.

The court finds as a fact that the parties, during a period of more than eight years, were "engaged jointly in working and developing said property, with a view of extracting ores and of selling said property"; and also that these relations "existed at the time the contract of lease and sale mentioned in the complaint was entered into." The legal conclusion is, that "at the time of the contract for the sale of the property . . . by Lloyd and others to Couch, a partnership existed between the parties owning the property with reference thereto, . . . and they are entitled to share proportionately in the proceeds thereof." These findings of fact are not within the issues, and cannot support a judgment.

The court in *Dutro v. Kennedy*, 9 Mont. 101, said: "Had the judge found and so decreed otherwise, the findings would have been disregarded as being outside of the issues: *Marks v. Sayward*, 50 Cal. 57; *Gregory v. Nelson*, 41 Cal. 279." The court in *Marks v. Sayward*, 50 Cal. 60, said: "The plaintiff contends that these facts are not within the issues, and we are of the opinion that this position must be sustained. There is nothing in the proceedings pointing to the existence of a partnership." See also *Morenhout v. Barron*, 42 Cal. 605; *Devos v. Devos*, 51 Cal. 543; *Green v. Chandler*, 54 Cal. 626.

The complaint alleges: "The plaintiffs, the defendant, John E. Lloyd, and their other said co-owners and tenants in common in the premises hereinbefore described, obtained and acquired title thereto a number of years ago, to wit, on or about the first day of September, A. D. 1881, with the intention and for the purpose of prospecting, developing, working, and mining the same, and to that end and purpose they then agreed among themselves and with each other to associate themselves together, and they and every of them did then enter into and form an association, company, and mining copartnership, whereby they agreed and undertook to develop, work, and

mine the said premises, and to bear, share, and divide the expenses, issues, profits, and losses of and incident to such venture and undertaking among themselves, in proportion and according to the interest, part, and moiety claimed and owned by each of them, respectively, therein; and that, in pursuance of said agreement, they, about the date last above named, jointly entered upon, and for a long time, to wit, for more than six years, prior to the execution of the contract of sale, lease, and deed hereinafter mentioned, actually engaged in developing and mining upon the said premises, by sinking shafts, driving and running tunnels, levels, and cross-cuts, and stopping therein and thereon, at great outlay and expense to said co-tenants and mining copartners, to wit, about the sum of twenty thousand dollars, which expenses so incurred were borne and paid proportionately by each and every of them, as aforesaid, and the proceeds of the minerals and ores extracted therefrom in the prosecution of said work and mining were divided and shared by each of them in the ratio aforesaid." There is no allegation in any of the pleadings that this development work was done for the purpose of selling the property, or that there was any copartnership organized for this object. The averment of the complaint is, that the mining copartnership agreed and undertook "the development work and mining of said premises," and paid therefor according to their respective interests. The contract with Couch devolved upon him this responsibility at his own expense. There is a broad distinction between the partnership which is described in the complaint and that which is created by the court: *Kimberly v. Arns*, 129 U. S. 512.

The court also finds that said John E. Lloyd, "by signing the deed and contract, selling for the entire consideration at one hundred thousand dollars (\$100,000), and concealing the fact that he had an agreement for the payment of an additional thirty thousand dollars (\$30,000), induced the plaintiffs to sign the contract and deed with Thomas Couch for the sale and conveyance of the property described in the complaint." What are the allegations of the complaint concerning this part of the case? That John E. Lloyd and Couch, "and each of said defendants, falsely and fraudulently, with the intent to deceive, cheat, and defraud the plaintiffs, suppressed the truth, and represented to the plaintiffs that the entire consideration and purchase price to be paid for the sale and conveyance of said premises was only the sum of one hundred thousand dol-

lars, when they, the said defendants, very well knew that the said representation was false and untrue, and that in truth and in fact the real and actual consideration to be paid therefor was at least the sum of one hundred and thirty thousand dollars; that on or about the thirty-first day of March, 1888, the plaintiffs, having been deceived and misled by the said false and fraudulent concealments and representations, which they then believed to be true, were inveigled and induced thereby to join the defendant John E. Lloyd and their other said co-tenants in making and executing a written lease and contract of sale, which the defendant Lloyd first signed, upon certain terms and conditions therein specified, to the said defendant and Couch."

It will be remarked that there is a conflict between these allegations and the findings, and the court does not justify its action by any declarations of Couch, John E. Lloyd, or any of the appellants. According to the complaint, the false representations were made by Couch, John E. Lloyd, and each of the defendants before, and caused the respondents to join in, the execution of the instruments. The court reverses this order of conduct, and deduces from the act of John E. Lloyd in signing the papers, and silence of John E. Lloyd and Couch, the fraudulent statements. We may observe that the jury found for the appellants upon these issues, and we repeat two of the special findings: "Did the defendant John E. Lloyd in any manner whatever, induce the plaintiffs to accept at the rate of one hundred thousand dollars for their interest in the property described in the complaint? A. No. Did the defendant John E. Lloyd, at any time or at all, make any false representations to the plaintiffs, whereby they were induced to sign the contract with Thomas Couch, for the sale of the property described in the complaint? A. No." The court virtually approved this part of the verdict, and upon another ground has inferred its facts.

When, therefore, we divest the findings by the court of all the matters which are outside of the issues, the relations of the owners of said property when the instruments were executed were those of tenants in common, and no more. Prior to that time they had been mining partners within definite limits, which did not embrace the business of selling their claims or interests therein. Upon this hearing, and in the opinion of the court, which is contained in the transcript, there has been no serious controversy with reference to any

fact, and counsel differ respecting the application of the legal principles. The court erred in its conclusions of law upon the findings as they stand when corrected in accordance with this opinion. We have endeavored to ascertain the true guides for the settlement of these issues, and it is not necessary or proper to remand the case for a new trial.

It is ordered and adjudged that the judgment be reversed, and that the cause be remanded, with directions to enter judgment for the defendants.

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THAT A MINING PARTNERSHIP is governed by rules peculiar to itself is indisputable, but the doctrine adopted by the court appears to go beyond any of the authorities cited in support of its opinion. The principle that a mining partner may purchase the interest of a copartner or sell out to a stranger without consulting the other partners or being liable to an accounting does not necessarily lead to the conclusion that he should be permitted to join his partners in executing a contract of sale, while he is at the same time accepting from the purchaser a secret bonus. In the former case he is simply in the position of a share-holder in a joint-stock company, who transfers his shares to another share-holder or to an outsider, and is fully entitled to get the benefit of the current market price. No fraud, moral or legal, can be predicated of such a transfer. On the other hand, when a partner unites with his copartners in effecting a sale of the common property, his co-operation is intended to be, and must inevitably be, interpreted as a representation that they are all contracting on equal terms, and that he is taking no advantage of his connection with them. If this representation is false, he is utilizing his position as a partner to defraud the partnership. It is an erroneous view to compare such a transaction to one between strangers who are dealing at arm's length, for the relations between strangers preclude the possibility of such a misrepresentation. Even though the parties in the principal case were not in any sense trustees for each other, in regard to the disposal of their individual interests, there is certainly nothing in the authorities cited to show that they should not have been bound to exercise good faith, when it came to a question of executing a contract for the joint benefit of all the mine-owners. In *Mattheus v. Bliss*, 22 Pick. 48, the case upon which most reliance is placed, there is really nothing inconsistent with the view for which we are contending. The sale in that case was one between the co-tenants themselves, and if there had been no other circumstances in the case, the seller, according to received principles, would have had no remedy; for the fact that the purchasers had arranged beforehand to resell the property at a large profit could not have vitiated the transaction. This is merely an application of the principle illustrated by the oft-quoted case of the person who buys land at a low price, knowing there is a valuable mine under it. The sale between the co-tenants being lawful, the court could not inquire what the purchasers intended to do with the property bought. There is accordingly, as it seems to us, a sharp line of distinction between the Massachusetts and the Montana cases. The latter seems rather to fall under the principle set forth by Chief Justice Shaw in the sentence which follows the passage quoted by the court, viz., that if, "with advantageous knowledge possessed by one of the tenants in common, there be any, though slight, false and fraudulent suggestion or representation, then the transaction is tainted

with turpitude, and is alike contrary to the rules of morality and law." The signing of the joint contract was certainly a "alight" representation of a fraudulent character. Or perhaps the case might fairly be brought within the rule propounded in a previous sentence of the same opinion, — that "in respect to any contract for the use or employment of the common property," the co-tenants may perhaps be deemed "to place confidence mutually in each other." There seems to be no difference, in principle, between the obligations of good faith raised by a contract for the sale of and a contract for the use of the common property. The language of the Massachusetts court, it is true, seems to draw a distinction of this nature, but the words should be read merely with reference to the actual case of a sale between the co-tenants themselves. The decision of Chief Justice Shaw lays down a doctrine which is, to say the least, not calculated to encourage fair dealing among associates under circumstances in which the average man will always look for a higher measure of candor and good faith than in a transaction between strangers. Such a doctrine may be justifiable under the strict common-law principles, but it is so repugnant to the more elevated standards by which equity measures the degree of honesty which should enter into contracts, that even if it should not be discarded altogether as a precedent, it ought certainly to be limited strictly to the circumstances to which it was originally applied. To extend it to such a transaction as that of the principal case is somewhat like an anachronism in jurisprudence.

FINDING BY THE COURT has the force and effect of a verdict of a jury: *Swayne v. Waldo*, 73 Iowa, 749; 5 Am. St. Rep. 712; *Handlan v. McManus*, 100 Mo. 124; 18 Am. St. Rep. 533. If the evidence is conflicting, the supreme court will not review the findings: *Krider v. Milner*, 99 Mo. 145; 17 Am. St. Rep. 549; *Devlin v. Quigg*, 44 Minn. 534; 20 Am. St. Rep. 592. See also note to *Savannah etc. Ry Co. v. Flannagan*, 14 Am. St. Rep. 183.

MINING PARTNERSHIPS are discussed at length in the extended note to *Skilman v. Lachman*, 83 Am. Dec. 103-111.

A FINDING OUTSIDE THE ISSUES MUST BE DISREGARDED: *Albertoli v. Brannan*, 80 Cal. 631; 13 Am. St. Rep. 200.

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## ARNOLD v. SINCLAIR.

[11 MONTANA, 556.]

**FINAL JUDGMENTS IN EQUITY, WHAT ARE.** — If, after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, it is final; otherwise it is interlocutory.

**A JUDGMENT IN EQUITY IS FINAL** which determines that plaintiff and defendant were partners; that the partnership has been dissolved; that the profits and losses were to be shared equally between the partners; that the assets of the partnership are in the possession of the defendant, and requires him to account to plaintiff touching the affairs of and business of the copartnership, and appoints a receiver to take possession of the property and do such acts respecting it as the court may authorize, and to close up the business, and directs that a referee be appointed to state



an account between the partners and report it to the court, and that the residue of the property be divided between them.

**FINAL JUDGMENTS.** — THE FACT THAT A REFERENCE IS ORDERED for some purpose does not itself determine that a judgment is not final.

**SUIT** to establish the existence of a partnership between the plaintiff and defendant. Though the partnership was denied by the defendant, the finding of the court was against him, and a decree was entered, the substance of which is stated in the *syllabus*.

*Cooper and Pigott*, for the motion.

*Thomas E. Brady, and McConnell, Clayberg, and Gunn, contra.*

**DE WITT, J.** There is an appeal from the judgment and an appeal from the order denying the motion for a new trial. Respondent contends that the judgment is not a final one, hence that appeal must be dismissed; and again, that if the judgment is not final, the motion for a new trial was premature, and hence that appeal must be dismissed.

We will inquire as to the first proposition. Was the judgment final, and so appealable? or was it an interlocutory order, and not appealable? Under the statute, an appeal can be taken only from a final judgment, and from certain defined orders: Code Civ. Proc., secs. 421, 444. Whether a judgment is final or not is sometimes a matter difficult of determination. Mr. Black, in his work on judgments (sec. 41), introduces his discussion of this subject with these words: "In drawing the distinction between final and interlocutory adjudications, the greatest difficulty has been experienced in the case of decrees in equity; the confusion arising principally from the peculiar nature of the decisions, and the wide range of means which chancery possesses both for informing the mind of the judge and for acting upon the parties concerned. Many tests of finality have been proposed," etc. The author cites from *Kelley v. Stanbery*, 13 Ohio, 408, commending the rule as laid down in that case as follows: "The confusion has sprung up from failing to observe the distinction between facts and things to be ascertained preparatory to final decree, and facts and things to be ascertained in execution of final decree. Because a final decree might direct that certain facts should be ascertained in execution of such decree, it will not make it interlocutory; nor, on the other hand, because the decree finds the general equities of the cause, and reference is had to a master to ascertain

facts preparatory to final disposition, will it be regarded as final."

In all the many cases that we have examined we find the general tendency to be as laid down in the Ohio case, — that if the matters and things to be ascertained after the entry of the judgment are for the purpose of carrying that judgment into execution, then such judgment is final. As is said in Freeman on Judgments, sec. 36: "If, after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, the decree is final; otherwise it is interlocutory."

We have very carefully examined the cases cited by respondent in his brief on the motion. We have also examined the following cases in New York: *Swarthout v. Curtis*, 4 N. Y. 415; *Griffin v. Cranston*, 5 Bosw. 658; *Lawrence v. Farmers' L. & T. Co.*, 6 Duer, 689; *Prentiss v. Machado*, 2 Rob. (N. Y.) 660; *Ives v. Miller*, 19 Barb. 196; *Lawrence v. Fowler*, 20 How. Pr. 407; *Chittenden v. Missionary Society*, 8 How. Pr. 327; *Clark v. Brooks*, 2 Abb. Pr., N. S., 385; *Tompkins v. Hyatt*, 19 N. Y. 534.

We are fully aware of the modern tendency to allow but one appeal in a case; that is, that a case shall come up altogether, and not by piecemeal. This, of course, is outside of the consideration of the particular orders made independently appealable; such as an order denying a motion for a new trial, etc.: Code Civ. Proc., secs. 421, 444. But the statute of this state recognizes that something may occur even after a final judgment whereby a party may be so aggrieved that he should have an appeal; and the section last above cited provides for an appeal from a special order made after final judgment.

The case at bar is an action of an equitable nature. Are all the equities of the parties determined, and nothing left to be done but to carry the judgment into execution? We find it remarked in several New York cases that although further proceedings before the master are necessary to carry the decree into effect, yet if all the consequential directions depending upon the result of the proceedings are given in the decree, it is final. Some future orders of the court may be necessary to carry it into effect. So some future order of the court might be necessary to carry into effect a plain money judgment in an action at law.

It seems, from an examination of the decisions of the courts wherein a code practice prevails, that the doctrine of allowing

but one appeal is more strictly enforced; and that the judgment, to be appealable, must finally determine the rights of the parties. But this tendency of legislation and decision thereupon is not in conflict with the view that, even if a judgment does finally determine the rights of the parties, there may be still left to the court the office of putting the party into possession of his rights so determined, and the carrying into execution of such judgment. We entertain no doubt as to the correctness of these principles. Their application to particular facts of a case is sometimes difficult. The case at bar must be determined upon its own facts.

The case was tried partly by a jury and partly by the court. The jury found one issue, — the existence of the partnership. This the court adopted, and found other facts, and added its conclusions of law. It is to be observed at this point that the decree recites that "this cause came on to be heard and determined," and further, "that the only issue now being tried to said jury is whether or not a copartnership existed," etc. So but one issue was being tried by the jury, and the other issues by the court. This appears by the stipulation of the parties, approved by the court, and by the decree itself, which determines, as observed, many issues other than that found by the jury.

On the motion to dismiss the appeal the findings and conclusions are not attacked, and so we may take them as correct.

The issue in this case was this: The plaintiff, on his side, contended that a partnership had existed; that it had been dissolved by plaintiff's withdrawal; that the partnership property and assets were in the possession of defendant; that plaintiff was entitled to an accounting; that he was entitled to have a receiver appointed, and the property of the firm sold, the debts of the firm paid, and the surplus divided between plaintiff and defendant, according to their several interests, which interests, the complaint alleged, were equal. The defense was a denial of the existence of the partnership, and all the facts auxiliary thereto pleaded by plaintiff, and the setting up that the relations of defendant and plaintiff were that of employer and servant. The judgment of the court, after adopting the finding of the jury, determined every issue above recited in favor of plaintiff, and furthermore found that the shares of the partners were equal.

It is true that the prayer of the complaint, in section 5, asks for judgment against defendant for such sum as may be found

due from defendant to plaintiff. This portion of the prayer is wholly out of place in the pleading, for the whole theory of the complaint is, that plaintiff wants the partnership affairs wound up and settled, and that out of the net assets of the concern plaintiff receive his share, and defendant as well receive his. The action is not on a money demand by plaintiff against defendant, as section 5 of the prayer would indicate. The complaint is wholly inconsistent with the idea that there is any indebtedness from defendant to plaintiff, for the reason that it alleges that plaintiff has drawn more money from the alleged partnership than has the defendant. The complaint, read as a whole, makes this clear, and thus section 5 is immaterial matter: *Davis v. Davis*, 9 Mont. 275.

The complaint does not ask judgment for any amount of money. It was not the nature of the action for the complaint to so pray. The complaint prayed for the determination of certain matters. Those matters were all determined by the judgment. The complaint prayed for certain relief. Every item of such relief was granted. Every right alleged, every relief prayed, by plaintiff, was determined in his favor.

Now what remains? Simply to put plaintiff in possession of that which the court has determined that he is entitled to; simply to execute the judgment which has settled the rights of the parties; simply to carry out relief granted. The court takes possession of the property by its receiver. The referee, as an accountant, states the account. The court parcels to this one his half, and to that one his half, and so executes the judgment.

We are of opinion that the facts of this case fall within the rule above pointed out, and that the matters remaining to be ascertained are for the purpose of carrying out the judgment, not for the purpose of framing the judgment. The judgment is, that each party is entitled to one half of the assets of the partnership after the debts are paid. That is the determination of their rights. That is the judgment. The execution of this judgment is all that remains.

We are aware of the condition of the California decisions in this matter. *Crowther v. Rowlandson*, 27 Cal. 376, was an action to declare certain instruments void. Findings were made, and the case was referred to a master to state an account. In the opinion appears a *dictum* to the effect that the trial was not complete until the report of the referee was filed. This *dictum* is quoted and treated as a decision in *Hinds v.*

*Gage*, 56 Cal. 486, and *Duff v. Duff*, 71 Cal. 513. The question is also touched upon in *Harris v. San Francisco Sugar Refining Co.*, 41 Cal. 393; *Jones v. Clark*, 42 Cal. 180; *Clark v. Dunnam*, 46 Cal. 205; *Bates v. Gage*, 49 Cal. 126; *Williams v. Conroy*, 52 Cal. 414; *White v. Conway*, 66 Cal. 383; *Dominquez v. Mascotti*, 74 Cal. 269; *San Diego etc. Co. v. Neale*, 78 Cal. 63; *Sharon v. Sharon*, 79 Cal. 701.

We do not understand that it can be laid down as a general principle that a trial is incomplete, and hence a judgment is not final, simply because a reference is had for some purpose; that is to say, the fact of a reference being had after judgment does not in itself determine that the judgment is not final. Nor do we think that the California cases intend to so hold, although in some of the cases from that court the principle is announced so generally and without qualification that the reader may be led to conclude that the court intended to announce that the fact of a reference after judgment in itself determined the non-final character of the judgment. But the case of *Clark v. Dunnam*, 46 Cal. 205, following *Jones v. Clark*, 42 Cal. 180, and the later cases, especially *Sharon v. Sharon*, 79 Cal. 701, bring the principle nearer to what we believe is the correct rule, as we have indicated above. A reference after judgment does not, *per se*, determine the character of the judgment as to its finality. It may be final, or it may be an interlocutory order, depending upon its facts. If the reference be for the purpose of executing the judgment only, after the judgment has finally determined all the rights of the parties, then the judgment is final.

We observe, from the study of the adjudicated cases, that great difficulty arises in applying the rule; but we are of opinion that in this particular case the facts warrant us in concluding that the judgment was final. The appeal therefore lies. The motion for a new trial was not premature, and the motion to dismiss the appeal must be denied, which is accordingly done.

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WHAT JUDGMENTS ARE FINAL: See extended note to *Williams v. Field*, 60 Am. Dec. 427-439; and also the note to *Davis v. Davis*, 20 Am. St. Rep. 173.

THE FINALITY OF A DECREE will not prevent any proceedings by the court necessary and proper to carry it into complete execution: *Baltimore & Ohio R. R. Co. v. Vandewerker*, 33 W. Va. 191. A judgment, though final, is under the control of the court during the term at which it is entered, but after that term the court is without power to vacate it or strike it off: *City of Philadelphia v. Coulston*, 118 Pa. St. 541. Compare *Siloam Springs v. McPhitridge*, 53 Ark. 21.

A DECREE IS NONE THE LESS FINAL because there is a reference to the master to ascertain facts for an account: *Bank of Mobile v. Hall*, 6 Ala. 141; 41 Am. Dec. 41; *contra*, *King v. Barnes*, 107 N. Y. 645; *Williams v. Walker*, 107 N. C. 334. A judgment in favor of an intervener is final as to all the parties: *Graves v. Campbell*, 74 Tex. 576. Where a severance has been allowed on the trial of an action against several defendants, there may be more than one final judgment: *Boone v. Hulsey*, 71 Tex. 176.

A JUDGMENT IS FINAL which settles the rights of the parties, though there is an order retaining the case on the docket, for the purpose of executing the judgment: *Brown v. Fancleave*, 86 Ky. 381. But an order vacating a judgment temporarily is not final: *List v. Jockheck*, 45 Kan. 349; nor an order made at the instance of attaching creditors, which appoints a receiver, and grants an injunction against proceedings under prior attachments: *East etc. Lumber Co. v. Williams*, 71 Tex. 444.

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## BARNEY v. HAYES.

[11 MONTANA, 571.]

**WILLS—EFFECT OF CODICIL.**—Though a will is revoked by the marriage of the testator after its execution, yet it may be republished and revived by a codicil executed subsequently to the marriage.

**A WILL IS AN INSTRUMENT** by which a person makes a disposition of his property, to take effect after his decease.

**WILL, WHAT IS.**—A letter written by a testator to his attorney, saying, "What I want is for you to change my will so that she may be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I do not know what ought to be done, but you do,"—discloses an *animus testandi*, and should be admitted to probate with the will to which it refers, for it, with such will, must be regarded as one instrument, constituting the last will of the testator.

*O. F. Goddard, and Cullen, Sanders, and Shelton*, for the appellants.

*Savage and Day*, for the respondent.

**DR WITT, J.** The Probate Practice Act, section 22, provides: "The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it."

It is not disputed that the original will was properly executed, and was, before the marriage of the decedent, a good and valid will. It is conceded that the marriage of decedent revoked that will: Comp. Stats., sec. 459, p. 384. It is clear that if the letter of the decedent is a codicil to said will, it republished the will, and that the will and codicil together con-

stitute the last will and testament of the decedent: Comp. Stats., sec. 448, p. 382. The letter referred to the previous will. The whole gist of the case, therefore, is, whether said letter was a codicil; that is, whether it was testamentary in character. The court submitted to the jury a great number of questions, which seem to have included all matters of fact in the case. The court also required the jury to determine whether said letter was a codicil. The jury said that it was. The court set aside this finding, and held that the letter was not a codicil. The respondent now contends that this finding of the jury was a conclusion of law, and that the court was not bound thereby, and that such finding was practically a nullity. Appellant contends that the court was bound by all the findings of the jury, and that it was error to set them aside. The court certainly submitted all the facts to the jury. It looks as if a large portion of the law as well had gone to the jury for determination, and that the court was then dissatisfied with the jury's view of the law.

But passing this anomalous condition of affairs, and disregarding the submission of law to the jury, we will decide this appeal upon the following view: The facts are all found. The findings have never been attacked. We take them all as true. On these facts, did the court correctly construe the letter from the deceased to his attorney? That is to say, we will proceed to determine whether the said letter was, under the established facts, a codicil, and testamentary in character.

It is claimed that the letter is an holographic will or codicil. The statute provides as follows:—

"Sec. 439. An holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this territory [state], and need not be witnessed."

"Sec. 19. An holographic will may be proved in the same manner that other writings are proved."

It is perfectly clear from the findings that this letter fulfills every requirement of the statutes *supra*, as to the execution and proof.

The only question remaining is, whether it is testamentary in character. A decision of this point was reserved on the former appeal of this case.

"A will is an instrument by which a person makes a disposition of his property, to take effect after his decease": 1 Jarman on Wills, 26, and notes.

"A last will and testament may be defined as the disposition of one's property, to take effect after death": 1 Redfield on Wills, 5.

"Swinburne defines a 'testament' to be a 'just sentence of our will, touching that we would have done after our death'": *Turner v. Scott*, 51 Pa. St. 132. Woerner, in the American Law of Administration, expresses the same views: Chap. 5.

The decedent in this case, in the letter in question, announces his marriage, and then writes: "What I want is for you to change my will so that she [his wife] will be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I don't know what the laws are in Montana. I don't know what ought to be done, but you do."

Do these words disclose an *animus testandi*?

The writer expresses his wish that his wife shall have something. The reasonable construction of the letter is, that he wished her to have a certain portion of his estate after his death. His intent may be expressed by the word "want," which he uses, or "wish," or "desire," as well as by the words "command" or "direct": *Busby v. Lynn*, 37 Tex. 150. To be sure, what the decedent wrote was that he "wanted his will changed." It is argued that it was not changed. But did not this letter change it? The original will was the expression of his intention, on June 15, 1889, as to the disposition of his property after death. That was his "will," using that word in its original sense of "intent," "desire," or "command." Now, on August 18, 1890, he had another "will," or "intent," or "desire." That later "will," or "intent," or "desire" he clearly expressed in his letter of that date. That letter was, using the old definition, "his just sentence of his will touching what he would have done after his death." Can any one read the decedent's letter and be in any doubt as to what he intended should be the disposition of his property as to his wife? We think not. Such holographic will need not be in any particular form: Prob. Prac. Act, sec. 439. If the decedent's intention is clear, that intent must not be ignored because the language is not technical. The expression of decedent's intention is as clear as that in the case of *Estate of Wood*, 36 Cal. 75, or in the case of *Succession of Ehrenberg*, 21 La. Ann. 280; 99 Am. Dec. 729. In the latter case the holographic will was as follows:—



"NEW ORLEANS, September 15, 1859.

"Mrs. Sophie Loper is my heiress.

"G. EHRENBURG.

"The legatee's name is correctly spelled Loeper.

"G. EHRENBURG."

On the back of this instrument is written the following: "Ehrenberg's will, to be opened by S. B. Patrick, who will see it executed. A copy of this will is left in the hands of the heiress." See also *Clarke v. Ransom*, 50 Cal. 595, and authorities cited; also *Robnett v. Ashlock*, 49 Mo. 171; *Morrell v. Dickey*, 1 Johns. Ch. 152, opinion by Chancellor Kent; *Cowley v. Knapp*, 42 N. J. L. 297; *Byers v. Hoppe*, 61 Md. 206; 48 Am. Rep. 89.

No motion for a new trial was made in the case at bar. The findings of fact were not attacked. Whatever the jury may have found as to the law we do not consider. But we are of opinion that when the district court had before it the facts found, the court should have concluded that those facts established the letter in evidence to be a codicil. The judgment is therefore reversed, the cause is remanded, and the district court is directed to admit to probate the will of June 15, 1889, with the said letter of decedent as a codicil, the two writings together constituting the last will and testament of said Charles E. Barney, deceased.

AN INSTRUMENT IS A WILL, whatever its form, if the intention of the maker to dispose of his estate after death is sufficiently manifested, and this intention is lawful in itself, and the writing have the statutory formalities: *Babb v. Harrison*, 9 Rich. Eq. 111; 70 Am. Dec. 203.

REVOCATION OF WILL BY MARRIAGE: See *Stewart v. Mulholland*, 88 Ky. 38; 21 Am. St. Rep. 320, and note. Mere subsequent recognition will not revive a will revoked by marriage or otherwise; it can only be revived by a valid re-execution, even though it is holographic: *Stewart v. Mulholland*, 88 Ky. 38; 21 Am. St. Rep. 320. A monographic note upon the revocation of wills, will be found appended to *Graham v. Burck*, ante, p. 339.

THE PROVISIONS OF A CODICIL prevail over those of a previously executed will: *Sturgis v. Work*, 122 Ind. 134; 17 Am. St. Rep. 349; *Estate of Hunt*, 133 Pa. St. 260; 19 Am. St. Rep. 640, and note. But the intention of the testator to modify the will must be clearly expressed, or appear by necessary implication from the terms of the instrument: *Viele v. Kesler*, 129 N. Y. 190; *Rhys v. Torrence*, 109 N. C. 652.

HOLOGRAPHIC WILL—REQUISITES.—An instrument entirely written, dated, and signed by the testator is clothed with all the formalities of law required to constitute a valid holographic will: *Ehrenberg's Succession*, 21 La. Ann. 280; 99 Am. Dec. 729. Thus a writing in lead-pencil, made by a married woman, wanting the form of a will, and written in the form of a letter, with her usual signature at the end of it, was held valid as her will, under a Pennsylvania

statute enabling married women to execute their will as if sole: *Estate of Knox*, 181 Pa. St. 220; 17 Am. St. Rep. 798. On the other hand, a letter from a brother to his sister, expressing a desire for full information about his mother and his sister's children, stating that he is pecuniarily independent, that his health is probably ruined, and that he wants to anticipate possibilities, and using the words, "You and your children get everything; your boy I want given the best of educations," — is not testamentary in character, there being nothing in the surroundings or circumstances of the writer which evince an intention that the letter should be regarded as his last will: *Estate of Richardson*, 94 Cal. 63. This decision seems somewhat inconsistent with the principal case.

THE EXECUTION OF A CODICIL has the effect to republish the whole will, modified by the codicil, as of the date of the codicil: *In re Ladd*, 94 Cal. 670; and both are to be construed together as a single instrument executed at the date of the codicil: *In re Ladd*, 94 Cal. 670.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NEBRASKA.**

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**SHELLENBERGER v. RANSOM.**

[31 NEBRASKA, 61.]

**DESCENT — FATHER WHEN HEIR TO CHILD.** — When a child dies a natural death, without issue, and possessed of an estate descended to him or her from the mother, the father will take such estate by inheritance.

**DESCENT. — DECEDENT MURDERED BY HEIR.** — A person cannot take by inheritance the estate of a person whom he murders for the purpose of removing the life that stands between him and such estate.

**DESCENT — DECEDENT MURDERED BY HEIR — PURCHASER FROM MURDERER.** — A purchaser from a father who has willfully murdered his child for the purpose of inheriting her estate acquires no interest in such estate.

*O. P. Mason*, for the plaintiff in error.

*John C. Watson, Frank T. Ransom, and George D. Scofield*, for the defendants in error.

**COBB, C. J.** The defendants in error, on December 28, 1887, made their complaint in the district court of Otoe County, setting up that on April 28, 1881, Elijah Gibson, then the owner of the northeast quarter of section 5, township 7 north, of range 14 east, of the 6th P. M., in Otoe County, deeded and conveyed the same, in fee-simple, to Emma Shellenberger, the wife of Leander Shellenberger, and the mother of Maggie Shellenberger and Joseph Lee Shellenberger, then infants and minors; that subsequently, and at no long period, the precise date of which does not appear, Emma Shellenberger died intestate, seised of said premises, leaving as her sole heirs at law her husband and children, and that upon her death the land descended to her husband during his lifetime, and that he became the tenant by his right of curtesy, with the remainder

after his death to his said children; that on April 29, 1886, the said Maggie died intestate, without issue, leaving as her only heir her father, who thereupon, with the surviving son and brother, became tenants in common of said premises, subject to the life estate of the father; that subsequently, on May 3, 1886, Leander Shellenberger and Miranda, his wife, by warranty deed conveyed to the defendants in error their interest in the premises, being the life estate of Leander and one undivided half of the remainder; that on July 28, 1887, Leander departed this life, and the defendants in error and Joseph Lee Shellenberger became the owners as tenants in common, each owning one undivided half of said land.

The defendants in error further alleged that Joseph Lee Shellenberger was a minor over the age of fourteen years; that the enjoyment of the premises in common was liable to difficulties and controversies, and was attended with great inconveniences to them; that their co-tenant could not contract or legally consent to the making of improvements, and for the same reason was incapable of consenting to an amicable partition of the premises, or of selling his interest therein to them, or of purchasing their interest himself.

The plaintiff in error was made defendant in the court below, judgment was asked confirming the shares in the premises to the parties as set forth, and for partition thereof, or, if the same could not be equitably divided, that it be sold and the proceeds divided according to the respective rights of the parties.

On March 13, 1888, on application of the guardian of the minor defendant, O. P. Mason, Esq., was appointed guardian *ad litem* for the defendant, with leave to answer, and answered, denying each and every allegation not expressly admitted, but admitting that the premises were conveyed to Emma Shellenberger as alleged; that she died intestate seised of the premises, leaving as her sole heirs her children and her husband, as alleged, to whom the land descended, with life estate in the husband, who became tenant by curtesy, with remainder after his death to the children as alleged; and further setting up that on or about the twenty-seventh day of April, 1886, the said Leander Shellenberger, willfully, feloniously, and of his deliberate, premeditated malice, did kill and murder his daughter, Maggie Shellenberger, and she then and there died intestate and without issue, leaving her father, Leander Shellenberger, who murdered her for the purpose of possessing himself of her estate

and title in fee-simple to the land aforesaid, and said plaintiffs claim that by and through said murder and the death of said Maggie Shellenberger, the said Leander Shellenberger became a tenant in common of said premises with the survivor, Joseph L. Shellenberger; that on or about the first day of May, 1886, the said Leander Shellenberger was arrested and charged with the murder of the said Maggie Shellenberger; that the said complainants herein, well knowing of the facts, and being attorneys at law, undertook the defense of said Shellenberger, and to secure them for their said services, the said Leander Shellenberger did, on or about the third day of May, 1886, with his wife, Miranda Shellenberger, duly convey to the plaintiffs, by warranty deed duly executed, their interest in said premises, being the estate, as claimed by the complainants, for life of Leander Shellenberger, and one undivided one half of the remainder; that shortly thereafter the said Leander Shellenberger was indicted and charged with the murder of said Margaret Shellenberger, and such proceedings were had in said cause in the state of Nebraska against Leander Shellenberger, indicted for the murder of his daughter, the said Maggie Shellenberger; but at the November term of the district court sitting within and for Otoe County, in the year 1886, he was convicted and sentenced for said murder, which sentence and judgment of the court remains unreversed in said court; that afterwards, and on or about the twenty-third day of July, 1887, the said Leander Shellenberger was taken from the jail of Otoe County, while under the sentence of death, and by a mob hanged, and the defendant herein, answering, charges and avers the fact to be, that the said plaintiffs in said petition, at the time they took a conveyance of said premises from said Leander Shellenberger and wife, well knew the facts, that the said Leander Shellenberger came to the said lands by the murder of his child, Maggie Shellenberger, and well knew all the proceedings in said court, resulting in his conviction, the judgment and sentence; and this defendant herein answering says that the said Leander Shellenberger could acquire no estate or interest or right or title in and to the lands in controversy, by and through his act of the murder of Maggie Shellenberger; and this defendant, in further answering, says that the said Leander Shellenberger did willfully, maliciously, and of his premeditated and deliberate malice, kill and murder the said Maggie Shellenberger, and cut her throat from ear to ear, for the sole purpose of removing her from this life, that he might

inherit the lands which descended to her by and through the death of her mother; that the defendant, in further answering, says that it is contrary to the law of the land that any should be permitted to come to an estate or an inheritance by their willful act of murder; and the said defendant, in further answering, says that the said Leander Shellenberger could take no estate from the said Maggie Shellenberger, whose death he had compassed and produced, and that he took no estate to himself, and conveyed none to the said plaintiffs herein, and the said plaintiffs acquired no right, title, or interest in and to the said estate, by and through the death of said Maggie Shellenberger, caused by said Leander Shellenberger, as hereinbefore alleged.

The guardian asked a decree that Leander Shellenberger took no estate by the death of the daughter, but that her estate descended to the brother, the minor defendant in this suit.

To this answer the plaintiffs' demurrer was sustained, and the following decree was rendered: "This cause came on this twenty-fourth day of March, 1888, to be heard upon the petition, answer, and demurrer of the plaintiffs to the answer of the defendant, made by O. P. Mason as guardian *ad litem* for the defendant Joseph L. Shellenberger, and the same is here argued and submitted to the court, and the court, being well advised in the premises, doth sustain said demurrer, to which action of the court the defendant excepts. And the said defendant, by his guardian *ad litem*, elects to stand on his answer, and the court doth find in favor of the plaintiff, and that the plaintiffs are the owners in fee-simple, and the undivided one half of the following described lands and premises, to wit, the northeast quarter of section 5, in township 7 north, range 14 east, of the 6th P. M., according to government survey, the said premises lying and being situated in Otoe County, Nebraska, and the defendant Joseph L. Shellenberger is the owner in fee-simple of the other undivided one half of said premises, and the plaintiffs are entitled to the partition of said premises. It is therefore considered, adjudged, and decreed by the court that the shares of each of said parties and their interests respectively in said lands be and the same are hereby confirmed, and that the partition be made accordingly. It is further ordered that Lewis Dum, M. E. Campbell, C. W. Seymore be and they are hereby appointed to make the partition of said real estate and premises into the requisite num-

ber of shares, and report the same to the present term of this court. And this cause coming on further to be heard on the report of the referees heretofore appointed herein, on the motion of the plaintiffs to confirm the same, and it appearing to the court that the said referees took and subscribed to the oath required by law, and the court having carefully examined the said report, and it appearing therefrom that the partition of said real estate cannot be made without great prejudice to the owner thereof, and the court being satisfied with the report, the same is hereby by the court confirmed and ordered to be entered of record, to all of which the defendant excepts. It is further ordered, adjudged, and decreed by the court that the said referees proceed to sell said premises at public sale, upon execution, for cash, at the east front door of the court-house in Nebraska City, in Otoe County, Nebraska, and the said referees, before proceeding to sell said real estate, to give security in the sum of five hundred dollars, to be approved by the court or the judge thereof, conditioned for the faithful discharge of their duties, and the said referees be required to make report of their doings into court, to all of which defendant, by his guardian *ad litem*, excepts and prays an appeal to the supreme court, which is allowed, and the amount of the *supercedas* bond to stay proceedings thereon is fixed at the sum of three hundred dollars, and forty days is hereby allowed to reduce his exceptions to writing."

The petition in error sets up: 1. The court erred in sustaining the plaintiffs' demurrer; 2. In finding that the plaintiffs were the owners in fee of an undivided one half of the premises, and were entitled to a partition of the same; 3. In confirming a share to the plaintiffs; 4. In appointing referees to make partition; 5. In confirming the report of referees; 6. In ordering a sale of the premises.

Two questions are presented and argued in the briefs of the plaintiff in error: 1. Whether, upon the death of Maggie (Margaret) Shellenberger, eliminating all considerations of the cause or manner of her death, the grantor of plaintiffs in the court below could take her estate in the lands in controversy by inheritance?

Counsel for the plaintiff in error contends that he could not, for the reason that the land, as counsel claims that the petition shows, came from Gibson, the father of Emma Shellenberger, deceased, who gave or devised the land to his daughter, and which, upon her death, descended to her two children, and

that the estate, being ancestral, Leander Shellenberger did not take it; that it did not descend to him on the death of her child, but descended to the surviving child. But it is to be observed that it cannot be gathered from the words of the petition that the land in controversy was either given or devised by Gibson to his daughter, or that it was an ancestral estate, but it does appear, upon the date named, that Elijah Gibson, then and before that time the owner of the land, by deed duly conveyed the same to his daughter Emma in fee-simple. The title, then, as I view it from the pleadings, commences with Emma Shellenberger, who must be presumed to have derived the same by purchase from Elijah Gibson, whom it inferentially appears was her father. I am therefore of the opinion that section 83 of chapter 28, Comp. Stats. 1887, is not applicable to this case, for the reason that the estate in controversy did not come to the intestate by descent, devise, or gift of some one of her ancestors, and it is therefore not material to inquire whether said section of statute is applicable to any case not involving the claim of kindred of the half-blood, but that the case comes within the provision of section 30 of said chapter, which provides that "when any person shall die seised of lands, tenements, or hereditaments, . . . they shall descend, subject to his debts, in the manner following: . . . 2. If he shall have no issue, his estate shall descend to his widow during her natural lifetime, and after her decease, to his father, and if he shall have no issue nor widow, his estate shall descend to his father."

Upon the face of the law and of the relation of Leander Shellenberger to the decedent, and without regard to or consideration of the second ground of defense set up in the answer, Leander Shellenberger would, upon the death of Margaret (Maggie) Shellenberger, take her estate in the lands by inheritance.

The second question is presented by the defendant in the court below in the following words: "That on or about the twenty-seventh day of April, 1886, the said Leander Shellenberger, willfully, feloniously, of his deliberate, premeditated malice, did kill and murder his daughter, Maggie Shellenberger, and she then and there died intestate and without issue, leaving her father, Leander Shellenberger, who murdered her for the purpose of possessing himself of her estate and title in fee-simple to said land.

The question presented by this clause of the answer is thus



tersely stated by counsel for the plaintiff in error in his brief: "Can a man realize substantial benefit from his own willful acts of deliberate and premeditated murder? Can he legally hold and enjoy the fruits of his crime?" This question was decided by the court of appeals of the state of New York in the case of *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819. The facts of that case, briefly stated, were these: Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in said action, and the remainder of his estate to his grandson, the defendant, Elmer M. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of the mother, in case Elmer should survive him and die under age, unmarried and without issue. The testator at the date of his will owned a farm and considerable personal property. He was a widower, and thereafter, in March, 1882, he was married to Mrs. Breese, with whom he entered into an antenuptial contract, in which it was agreed that in lieu of dower, and all other claims upon his estate, in case she survived him, she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequent to the death of the testator, Elmer lived with him as a member of his family, and at his death was sixteen years of age. He knew of the provisions made in his favor in the will, and that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poison.

It appears that the will was duly proved and admitted to probate, and an administrator with the will annexed appointed. Thereupon the action was brought to enjoin the administrator from disposing of the personal property of the decedent (testator) to the defendant (Elmer Palmer), and to declare him not entitled to the real estate under the will, upon the ground that he, being by and under the will practically constituted universal devisee and legatee of Francis B. Palmer, murdered the testator, who was his grandfather, to get immediate enjoyment of the property himself, and to prevent a revocation of the will. The general term of the supreme court having rendered a judgment for the defendant, the cause was taken to the court of appeals. The majority of the court, in an ex-

haustive opinion by Judge Earle, reversed the judgment of the supreme court, and directed a judgment to be entered enjoining Elmer Palmer and the administrator from using any of the personal or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him.

In entering upon the argument which led to the above conclusion, the writer of the opinion says: "The defendants say that the testator is dead; that his will was made in due form, and has been admitted to probate, and that therefore it must have effect according to the letter of the law. It is quite true that statutes regulating the making, proof, and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer. The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes, legally expressed, and in considering and giving effect to them, this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them, but it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it.

"It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers."

To these propositions the opinion cites many authorities of great weight and general acceptance. This opinion cites and discusses the case of the *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 599, which case is also cited by counsel for the plaintiff in error.

The facts of that case may shortly be stated as follows: One Hunter, partly in person and partly through one John M. Armstrong, effected an insurance, and received a policy of insurance in the New York Mutual Life Insurance Company

upon the life of the said John M. Armstrong, in whose life he claimed to have an interest growing out of certain partnership relations. Within six weeks after the policy was issued Armstrong was attacked at night in a street in Camden, New Jersey, and received blows on his head which fractured his skull, from which he died two days afterward. Suspicion fell upon Hunter as the perpetrator or instigator of the attack. He was accordingly arrested, was indicted and tried for the murder of Armstrong; he was convicted, sentenced to death, and hanged. The suit was brought against the life insurance company, removed to the circuit court of the United States, and brought upon error to the supreme court, where the judgment against the insurance company was reversed. In the opinion the court said (p. 600): "But independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he has feloniously taken. As well might he recover insurance money upon a building that he had willfully fired."

The principle of these cases, especially that of *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, is applicable to the case at bar; their analogies are immediate and certain. As I have already stated, in effect, the relation of Leander Shellenberger to Margaret Shellenberger was such that the law, upon her death, *prima facie* gave him her estate. But he was a man of full age, while she was an infant of tender years. In the ordinary course of nature she would outlive him; she also would grow up to womanhood, marry, and have issue who would become entitled to her estate upon her death, to the exclusion of her father. To prevent this, and to get the title and possession of her estate at once, according to the allegations of the answer demurred to, he murdered her. Had her death been the result of natural causes or a cause of which he was innocent, he would have taken her estate by inheritance; had he been allowed to take it at her death, caused as it was, he would have taken it by purchase rather than by inheritance, and at a price of such enormous iniquity that the mind shudders at its mention,—the murder of his own motherless daughter. I quite agree with the court of appeals that had it been in the mind of the framers of our statute of de-

scents that a case like this would arise under it they would have so framed the law that its letter would have left no hope for the obtaining of an inheritance by such means.

The holding that a person cannot take by inheritance the estate of a person whom he murders for the purpose of removing the life that stands between him and the estate is sustained by many maxims of the law and considerations of sound policy, and is not in violation of the provisions of the constitution of the United States or of this state against bills of attainder, and that no person shall be deprived of property without due process of law. Were it enacted into a statute, it would take no one's property from him nor work corruption of any one's blood, but would only stand in the way of taking an estate as a reward for the commission of crime.

The case of *Owens v. Owens*, 100 N. C. 240, was where a widow was convicted upon a charge of being accessory before the fact to the murder of her husband. She afterwards brought suit to have her dower assigned in the real property left by him. The supreme court, reversing the judgment below, held that, notwithstanding her criminal participation in her husband's death, she was entitled to be endowed of a share of his estate. The reason given by the court in the opinion is, that the statute having provided but one cause for which a widow should be barred of her dower, which was where she should commit adultery and not be living with her husband at his death, her right to dower is not affected by the fact that the intestate died at her hands or through her procurement. I agree with the New York court of appeals, which also reviewed this case in the opinion in *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819, in an unwillingness to assent to the doctrine of this case.

Counsel for defendants in error in their brief say: "As the appellees (defendants in error) are *bona fide* purchasers of the property in controversy, they cannot be affected by any wrongful acts, if any, of their grantor." As I view the case, Leander Shellenberger not taking the estate of Margaret in the land on account of his having murdered her in order to obtain it, he was only possessed of a life estate in the land, which estate he conveyed to the defendants in error, and which estate terminated upon his death by violence, as stated in the answer. No question of *bona fides* therefore arises. On the other hand, whether the defendants in error, at the time they took the conveyance of the land in question from Leander Shellenber-

ger, knew of his crime and its motive, is not deemed material, and will not be considered.

The judgment of the district court is reversed, and judgment will be entered in this court that the said Leander Shellenberger took no estate from the said Margaret (Maggie) Shellenberger, but that the said estate, upon her death in manner and by the means stated, descended and passed to the said Joseph Lee Shellenberger, and remains.

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**DESCENT.** — When a parent can inherit the estate of his deceased child is discussed in a note to *In re Ingram*, 12 Am. St. Rep. 104, 105.

**DESCENT — ANCESTOR MURDERED BY HEIR.** — An heir or donee who murders his ancestor or testator to obtain the latter's property will not be permitted to have any benefit as such heir or donee: *Riggs v. Palmer*, 115 N. Y. 506; 12 Am. St. Rep. 819.

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## FONNER v. SMITH.

[31 NEBRASKA, 107.]

**BANKS AND BANKING — CHECK AS APPROPRIATION OF FUND.** — A check drawn upon an existing fund in bank is an absolute transfer or appropriation to the holder of the amount designated in the check, then in the hands of the drawee, and entitles the holder to sue the bank in his own name upon its refusal to pay.

**BANKS AND BANKING — CHECK AS APPROPRIATION OF FUND — DUTY OF BANK TO PAY — SUBROGATION.** — A bank receives deposits on the express or implied promise to pay them out upon the checks of the depositor to any person in whose favor they may be drawn, to the extent of the deposit, and the check-holder is subrogated to the rights of the drawer in the deposit, to that extent is in privity, as assignee of the drawer, with the bank, and may sue it in his own name upon its refusal to pay the check.

**BANKS AND BANKING — RIGHT OF CHECK-HOLDER TO SUE BANK — WITHDRAWAL OF FUNDS.** — The holder of a check drawn upon funds in bank and presented before such funds are withdrawn may sue the bank in his own name for refusing to pay such check; and after notice to the bank of the drawing of such check, the fund thus appropriated cannot be withdrawn by the depositor.

*O. A. Abbott and J. N. Paul*, for the plaintiff in error.

*E. J. Huiner*, for the defendant in error.

**MAXWELL, J.** This is an action brought by J. H. Smith against John Fonner et al., lately doing business under the style of The Bank of Phillips, to recover the sum of \$495, with interest, on a check drawn by one of the members of the firm of John Fonner & Co., who were owning and operating the Bank of Phillips, against that bank in favor of Samuel Span-

ogle, another member of the same firm; the check purporting to have been drawn by Crane, treasurer of the Building and Loan Association of Phillips. The petition alleges a specific promise to pay, and also a promise by the trustee, to whom the assets of the Bank of Phillips had been conveyed for the purposes of liquidation.

It is clearly shown that the drawer had sufficient funds in the bank at the time the check was drawn and presented to pay said check.

In the trial of the cause the court below found the issues in favor of the defendant in error, and rendered judgment accordingly.

There was no motion for a new trial, and the question presented to this court is one of law, viz., is a check drawn upon an existing fund in a bank an absolute transfer or appropriation to the holder of the amount designated in the check, then in the hands of the drawee?

On this question there is a direct conflict in the authorities; and in number, at least, the weight of authority seems to be against the proposition. In deciding the question, however, we desire to be governed by such rules as seem to be based upon sound reason and calculated to promote justice.

The doctrine upon which it is held that a check is not the appropriation of the fund against which it is drawn is stated by Judge Davis in *Bank of the Republic v. Millard*, 10 Wall. 156, as follows: "On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it

owes any duty to the holder until the check is presented and accepted?"

This is the strongest presentation of the objections to a check being an appropriation of the funds of the drawer to the amount of the check to which our attention has been called, yet the fallacy of the reasoning can readily be shown. The principal objection of Judge Davis is the want of privity between the holder of the check and the bank. A bank, however, receives deposits on the express or implied promise to pay them out upon the checks of the depositor; and the depositor may draw his checks for small or large amounts, payable to his creditors or those to whom he desires to pay money, and the bank impliedly promises to pay such checks, by whomsoever presented, the only limitation being that the drawer shall not exceed the amount of his deposits. In effect the debtor says to his creditor: "I have deposited my money for safe-keeping in a certain bank, and I will give you a check thereon for the amount due you." The creditor thereupon accepts the check upon the implied assurance that the drawer has sufficient funds in the bank to pay it. Suppose, instead of the ordinary form of the check to "pay A B or bearer" a specified sum, the drawer should say, "I hereby assign to A B or bearer" a like portion of the deposit in the bank; in effect there would be no difference as to the right of the holder of the check to the portion of the fund appropriated by the drawer. At the present time checks are in common use to supersede the payment of money. Many persons pay nearly all claims through the instrumentality of checks. This is done to obviate the risk incident to carrying large sums of money on the person, or for want of adequate facilities for its safe-keeping; and second, as a means for correcting errors which may have occurred in the payment of claims, as a check when paid to a particular person is equivalent to a receipt. In regard to the alleged want of privity, it is sufficient to say that the holder of the check is subrogated to the rights of the drawer in the fund drawn upon, and therefore, to that extent, is in privity, as assignee of the drawer, with the bank. But suppose that there is no privity between the parties, the rule is now well settled that a party may sue on a promise made on sufficient consideration for his use and benefit, though it be made to another and not to himself: *Cooper v. Foss*, 15 Neb. 516; *Stewart v. Snelling*, 15 Neb. 502; *Shamp v. Meyer*, 20 Neb. 223; *Miliani v. Tognini*, 19 Nev. 133; *Lawrence v. Fox*, 20 N. Y. 268; *Farley v. Cleveland*, 4

Cow. 432; 15 Am. Dec. 387; *King v. Whitely*, 10 Paige, 465; *Halsey v. Fred.*, 9 Paige, 446; *Cumberland v. Codrington*, 3 Johns. Ch. 254; 8 Am. Dec. 492; *Merriman v. Moore*, 90 Pa. St. 80; *Putney v. Farnham*, 27 Wis. 187; 9 Am. Rep. 459.

We have no doubt, therefore, that the holder of a check, where the check was drawn upon funds and presented before such funds are otherwise drawn out, may sue the bank for refusing to pay such check: *Munn v. Burch*, 25 Ill. 35; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; 22 Am. Rep. 185; *Ridgely Nat. Bank v. Patton*, 109 Ill. 485; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Merchants' Nat. Bank v. Ritzinger*, 20 Bradw. 27; *Roberts v. Corbin*, 26 Iowa, 315; 96 Am. Dec. 146; *Fogarties v. State Bank*, 12 Rich. 518; 78 Am. Dec. 468; *Lester v. Given*, 8 Bush, 357; *McGrade v. German Sav. Inst.*, 4 Mo. App. 830; *Zelle v. German Sav. Inst.*, 4 Mo. App. 401; *McGregor v. Loomis*, 1 Disney, 247, 255; *Ancona v. Marks*, 7 Hurl. & N. 686; *Senter v. Continental Bank*, 7 Mo. App. 532; 3 Am. & Eng. Ency. of Law, 227; and after notice to the bank of the drawing of the check, the funds thus appropriated cannot be withdrawn by the drawer.

No question arises as to the time when the check was presented, nor is there any contest between the plaintiff and other check-holders.

The contest, therefore, is between the holder and the drawee, and as it appears that the bank had sufficient funds of the drawer when the check was presented, it should have paid the check, failing in which, the action is properly brought.

The judgment of the district court, therefore, is affirmed.

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**CHECKS — RIGHTS OF HOLDERS OF.** — A check, as to the drawer thereof, is an assignment to the holder of the deposit of the amount specified in the check, but creates no lien against the bank: *Hawes v. Blackwell*, 107 N. C. 196; 22 Am. St. Rep. 870, and note. A check drawn by a depositor for a less sum than he has in the bank operates to transfer the sum named to the payee who may, in some of the states, sue for and recover the sum from the bank: *Union Nat. Bank v. Oceana Co. Bank*, 80 Ill. 212; 22 Am. Rep. 185, and note; *Bickford v. First Nat. Bank*, 42 Ill. 238; 89 Am. Dec. 436, and note. An ordinary uncertified check does not amount to an assignment of any part of the sum standing to the credit of the depositor; it is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed: *O'Connor v. Mechanics' Bank*, 124 N. Y. 324.



## HAGLER v. STATE.

[31 NEBRASKA, 144.]

**OFFICERS — OFFICIAL BONDS — ALTERATION — RATIFICATION — LIABILITY OF SURETIES.** — When an official bond is altered after signing, but before delivery and approval, by the erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of or did not consent to the alteration nor ratify it; but if the sureties, with knowledge of the alteration, accept indemnity from the principal obligor, they thereby adopt and ratify the bond, and are thereafter liable thereon.

*Abbott and Abbott*, for the plaintiffs in error.

*George H. Hastings*, for the defendant in error.

NORVAL, J. This suit was brought in the court below against William R. Toole, as a former town treasurer of Dorchester township, Saline County, and V. W. Hagler, Andrew Moffitt, W. J. Jennings, N. C. Rierson, Alfred Barslow, and Paul Bankson, as sureties on his official bond, to recover the sum of \$2,064.48, with interest thereon. Toole failing to answer, his default was entered.

The defendant Moffitt filed an answer admitting that he signed the bond, and alleging that before the same was presented for approval, his name, at his request, was erased therefrom.

Hagler in his answer alleges that he refused to sign the bond unless Moffitt and the other defendants would also sign the same as sureties; that Moffitt promised to and did sign the bond, and the other defendants afterwards signed the same; that before its approval the name of Moffitt was purposely erased, without the knowledge and consent of Hagler, and that he had no knowledge of such withdrawal until after the defalcation of Toole.

The defendants Jennings, Bankson, Barslow, and Rierson join in an answer, in which they set up that Moffitt and Hagler had signed the bond when they signed the same, and allege that Moffitt's name was afterwards erased without their knowledge and consent, but before the bond was approved.

A jury was waived and the case was tried to the court, who found the issues against all of the defendants, and rendered a judgment in favor of the plaintiff below for \$2,530.50. All of the answering defendants joined in a motion for a new trial, which was overruled, and the sureties bring the case here on error.

The record discloses that the defendants Hagler and Moffitt signed the bonds by mutual agreement, and at about the same instant of time, Hagler signing first, followed by Moffitt. It was shortly afterwards presented to and was signed by the other sureties. After all the defendants signed the bond, and before it was presented for approval, Moffitt's name was, at his request, erased from the instrument by drawing a pencil line through the name, unbeknown to the other sureties. In this condition the principal in the bond filed it, and it was afterwards approved. Toole was robbed of the money which he had collected as taxes. No question is made as to the amount of his defalcation. It further appears from the testimony that soon after Toole was robbed, for the purpose of indemnifying the sureties against loss, he turned over to them his real and personal property of the value of several hundred dollars. The real estate consisted of two lots in the village of Dorchester, which were held at the time by Toole under a contract of purchase. Some time afterwards the sureties sold the personalty, and with the proceeds arising therefrom paid the unpaid purchase price on the lots, and took a deed therefor in the names of all the sureties, including Moffitt.

Until the bond in question was delivered to the proper officer and approved, it was not binding upon any of the obligors. Prior to its approval, any signer could lawfully have his name erased from the instrument, and such withdrawal from the bond releases the person withdrawing from all liability thereon.

It cannot be doubted that the erasure of Moffitt's name in the body of the bond, and as signed to it as one of the sureties, prior to its delivery and approval, without the knowledge and consent of his co-sureties, and after all had signed the instrument, was a material alteration. It made the bond quite different from that signed by the defendants. The releasing of Moffitt increased the liability of all the other sureties, and diminished their means of protection by way of contribution from Moffitt. But it is claimed by counsel for the defendant in error that when the sureties left the bond with Toole to deliver to the county clerk, they constituted him their agent, and as the bond is in the same condition as when delivered, they cannot set up as a defense that Toole erased Moffitt's name without their consent. While it is true the principal obligor was the agent of the sureties in delivering the bond, he was not authorized by them to change the obligation to their preju-

dice without their consent, or to deliver it in any other condition than it stood when they signed it. He could no more bind the sureties by erasing one of the obligors than he could bind them by increasing the amount of the penalty without their knowledge. The alteration of the bond in suit was such as to attract the attention of the reader of the instrument. It was the duty of the officer who approved it to have declined to accept it in its altered condition.

It was said by this court in *Cutler v. Roberts*, 7 Neb. 5, 29 Am. Rep. 371, that "if there is anything on the face of the bond, or in the attending circumstances, to apprise the obligee that the bond has been delivered by the sureties to the obligor to be delivered to the obligee upon certain conditions, which have not been complied with, the sureties may plead the failure to comply with the conditions as a defense in an action on the bond."

*State v. Craig*, 58 Iowa, 238, was an action upon a bond executed to the state of Iowa by the defendant Craig as warden of the penitentiary. After the signatures of seven of the sureties were obtained, one George H. Smith signed the bond as surety. The signatures of several others were obtained after that. Before the names of the sureties were inserted in the body of the bond, and before it was approved or offered for approval, the name of Smith was erased, partly at his request and partly because he refused to justify in an amount sufficiently large to satisfy Craig. None of the sureties consented to the erasure. They defended on the ground that Smith's name was erased. The court held that the alteration was a material one, and that the sureties who signed prior to Smith, as well as those who signed afterwards, were released.

In *State v. Churchill*, 48 Ark. 426, the principal defendant, Churchill, was elected treasurer of the state of Arkansas, and executed his official bond, with the other defendants as his sureties. The name of Radcliff, signed to the bond as one of the sureties, was erased by Churchill after all the defendants had signed it and before it was delivered or approved. None of the sureties had any knowledge of the erasure, except that A. H. Garland, one of their number, then governor of the state, observed the erasure when the bond was presented to him for approval. Upon these facts all the sureties, including Garland, were held not liable.

The rule, we think, was carried too far in the latter case in releasing Garland, who approved the bond with knowledge of

the alteration. The principle established by the adjudicated cases is, that where an official bond is altered after the same has been signed, but before its delivery and approval, by the erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of or did not consent to the alteration nor ratify it: *Smith v. United States*, 2 Wall. 219; *Dair v. United States*, 16 Wall. 1; *Boston v. Benson*, 12 Cush. 61; *Martin v. Thomas*, 24 How. 315; *United States v. O'Neill*, 19 Fed. Rep. 567; *State v. Craig*, 58 Iowa, 238.

It is urged by the defendant in error that the sureties having been indemnified by the principal obligor after the defalcation occurred, and with knowledge that Moffitt's name had been erased, they adopted and ratified the bond in the condition in which it was approved, and are liable thereon. Had the sureties consented to the alteration before the approval of the bond, they would have been liable. So, by receiving security from Toole after the defalcation occurred, with knowledge of the change in the bond, they adopted and ratified it as theirs, and are liable according to the conditions therein written.

It does not appear that all the sureties had knowledge of the taking of the security, but as all joined in the motion for a new trial, as it could not be allowed as to all, it was rightly overruled as to all: *Long v. Clapp*, 15 Neb. 417; *Dorsey v. McGee*, 30 Neb. 657.

The judgment of the district court is affirmed.

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**BONDS — ALTERATION — LIABILITY OF SURETIES.** — Where the county court approves an official bond, with knowledge that the name of one of the sureties thereon had been erased without the knowledge or consent of the other sureties, the bond is void as to them, as well as to another surety who signs afterwards without knowledge of such erasure: *State v. McGonigle*, 101 Mo. 353; 20 Am. St. Rep. 609, and note. See *Hessler v. Johnson*, 63 Mich. 623; 6 Am. St. Rep. 234, and note; note to *Sharp v. United States*, 28 Am. Dec. 679.

## KOEHLER v. DODGE.

[31 NEBRASKA, 228.]

**USURY — VERBAL PROMISE CONTEMPORARY WITH NOTE.** — When a person borrows money, giving his note therefor, which specifies on its face a legal rate of interest, a verbal promise of the borrower, made at the time, to pay interest in excess of that allowed by law, does not of itself make the transaction usurious; but when the verbal agreement is carried into effect at the time of the loan or subsequently, by the borrower paying the unlawful interest, or if the lender reserves any shift or device by which he receives the unlawful interest, the transaction is usurious.

**USURY.** — **PAROL EVIDENCE IS ADMISSIBLE** to show the usurious consideration of a note.

**USURY — UNLAWFUL INTEREST PAID UNDER PAROL AGREEMENT — RENEWED NOTE.** — A note bearing legal interest on its face, but executed in connection with a parol agreement under which additional and unlawful interest is paid thereon in advance until its maturity, is usurious, and a renewal note taken therefor, which gives no credit for the interest so paid in excess of the lawful rate, is also usurious.

**CORPORATIONS — OFFICERS — NOTICE.** — Knowledge acquired by an officer of a corporation, in a transaction in which he acts for himself alone and for his own private interests, will not bind the corporation in a subsequent transaction involving the same subject between himself and the corporation as a private individual, unless the knowledge was previously communicated to the corporation.

**NEGOTIABLE INSTRUMENTS — PROTECTION TO PURCHASER AFTER MATURITY.** — All purchasers of negotiable paper who purchase after maturity from an innocent holder for value take the paper free from all equities and defenses existing between the original parties to it.

**NEGOTIABLE INSTRUMENTS — INDORSEMENT AS SECURITY BEFORE MATURITY — RIGHTS OF PLEDGEE.** — When negotiable paper is indorsed and transferred before maturity as collateral security for a loan of money then made, the pledgee who takes the paper without notice of any defense is a holder for value in the usual course of business.

**NEGOTIABLE INSTRUMENTS — PURCHASER FROM PAYEE AFTER MATURITY.** — One who purchases a negotiable note after maturity from the payee is not an innocent holder, and takes the paper subject to the same defenses that existed between the original parties to it.

*O. A. Abbott*, for the appellant.

*Thummel and Platt*, for the respondents.

**NORVAL, J.** This suit was brought by the appellant in the district court of Hall County to foreclose a chattel mortgage given to secure two promissory notes, each in the sum of \$8,310.45, bearing date October 29, 1884, and drawing ten per cent from date. The notes were executed by Freeman C. Dodge, and were payable to William A. Hagge, the cashier of the State Central Bank of Grand Island, for the use and benefit of that bank.

It is alleged by the plaintiff that the defendants, at the time of the execution of the notes and mortgage, were partners doing business under the style and firm name of F. C. Dodge; that the notes and mortgage were given for the use and benefit of said firm, and that the plaintiff is an innocent holder for value.

The defendants contend that the notes were given in renewal of four other notes given to the State Central Bank, which were tainted with the vice of usury, and that the plaintiff purchased the notes in suit after maturity, and was chargeable with notice of the consideration for which they were given.

The district court made the following findings of facts:—

"1. That the defendants, Freeman C. Dodge and Edmund B. Abbott, were partners doing business under the style and firm name of F. C. Dodge, as alleged in plaintiff's petition, and that the notes and mortgage sued on were made by the defendant Freeman C. Dodge for the use and benefit of said firm.

"2. The court further find that the plaintiff, Gustave Koehler, was, at the time of the commencement of this suit, the lawful owner and holder of said notes, and entitled to a beneficial interest in said mortgage; that default has been made in the condition of said mortgage, and that the plaintiff is entitled to an order of sale of the mortgaged property.

"3. And the court do further find that the notes described in said mortgage were executed and delivered to said William A. Hagge for the use and benefit of the State Central Bank of Nebraska, of which bank he was, at the date of said notes, cashier.

"4. The court do further find that one of the notes described in said mortgage, and marked 'Exhibit A,' was, on the fifth day of February, A. D. 1885, sold, indorsed, assigned, transferred, and delivered to the United States National Bank of Omaha, Nebraska, as collateral security for a loan made to the State Central Bank of Nebraska, or to William A. Hagge and Henry A. Koenig, who were then the sole owners of the stock in the State Central Bank; that the assignment, transfer, sale, and delivery was made before the maturity of said note, and without any knowledge or notice to said United States National Bank of any defense thereto, and was received by the said United States National Bank of Omaha, Nebraska, as collateral security as aforesaid in the ordinary

course of its business, and for value; that prior to the purchase of exhibit A by the plaintiff herein, it had been returned to the Citizens' National Bank, or Koenig and Hagge.

"5. The court do further find that the other note described in said mortgage, and marked 'Exhibit B,' was by the State Central Bank of Nebraska sold, assigned, indorsed, transferred, and delivered to the Citizens' National Bank of Grand Island, Nebraska, in the ordinary course of the business of said State Central Bank of Nebraska, and that the Citizens' National Bank of Grand Island, Nebraska, purchased the same on the sixteenth day of December, 1884, and before the maturity thereof, but with notice of the equities of the defendant.

"6. The court do further find that Henry A. Koenig was president of the State Central Bank of Nebraska at the time said notes and each of them were made; that William A. Hagge was its cashier at the same time; and the court do further find that said Henry A. Koenig was, upon the organization of the Citizens' National Bank of Grand Island, Nebraska, duly elected president thereof, and that said William A. Hagge was duly elected vice-president thereof; that they have held said offices respectively since the organization of said last-named bank; that they, and each of them, at the time of the transfer of the note marked 'Exhibit B,' had full knowledge of the consideration for which said note, exhibit B, was given; that said knowledge was acquired by them while employed as president and cashier of the said State Central Bank of Nebraska.

"7. The court do further find that said notes and each of them were purchased by the said plaintiff after the maturity thereof, and that he paid therefor a valuable consideration and their full market value, and that he purchased or obtained exhibit B from the Citizens' National Bank of Grand Island, Nebraska, and exhibit A from the Citizens' National Bank, or of Henry A. Koenig and William A. Hagge.

"8. And the court do further find that at the time of the purchase thereof he was chargeable with full notice of the consideration for which said notes, and each of them, were given.

"9. The court do further find that the said notes, exhibits A and B, referred to in said mortgage, and each of them, were given in renewal of four several promissory notes described as follows, to wit, three notes dated September 21, 1881, one for \$3,000, due in thirty (30) days, one for \$3,000, due in sixty (60) days, and one for \$6,000, due in ninety (90) days there-

after; which said three several notes each bore interest upon their face at the rate of ten per centum per annum, payable monthly until paid; and each of said three notes were known and numbered as 5088, 5089, 5090; and one other note, dated February 7, 1882, for \$6,000; which said last-mentioned note was No. 5351, and was payable on demand, with interest from date at the rate of ten per centum per annum; on which last-mentioned note there was paid, on the twenty-fourth day of June, 1882, the sum of \$4,000 as principal.

"10. The court do further find that at the time of the execution and delivery of the said four notes above referred to as Nos. 5088, 5089, 5090, and 5351, there was a mutual understanding and agreement between the defendants and the State Central Bank of Nebraska, to which said notes were payable, that the defendants should pay interest thereon from the date thereof at the rate of eighteen per centum per annum, instead of ten per centum per annum, as expressed on the face of said notes.

"11. The court do further find that the defendants, after the execution and delivery of said four notes last above mentioned, paid interest thereon at the rate of eighteen per centum per annum on the amount due thereon from the date of said notes respectively up to the twenty-first day of January, 1883, and the court finds the amount of said payments so made at the rate of eighteen per centum per annum to be the sum of \$3,498.

"12. The court do further find that the notes described in the mortgage, and marked exhibits A and B, were given in renewal of the notes numbered 5088, 5089, 5090, and 5351, with interest thereon at the rate of ten per centum per annum from the twenty-first day of June, 1883, up to the twenty-ninth day of October, 1884, the day of the date thereof, and that by mistake of the parties drawing said notes and mortgage the same were made for a larger amount than the unpaid principal of said four notes, with interest thereon, the amount of such error being the sum of \$140.90."

A decree of foreclosure was entered for the sum of \$10,502, and the costs of suit were taxed against the plaintiff. The case is brought here by the plaintiff on appeal.

It appears from the tenth finding that at the time of the making of the four notes which were renewed by the notes in suit, it was agreed between the defendants and the payee that the makers should pay interest thereon from their date at the



rate of eighteen per cent, instead of ten per cent as expressed on their face. It is argued by counsel that the parol contemporaneous agreement to pay a usurious rate of interest did not taint the notes with usury. It is doubtless true that when a person borrows money and gives his note therefor, specifying a lawful rate of interest, a verbal promise of the borrower, made at the time the indebtedness is incurred, to pay an unlawful rate of interest for the use of the money, would not of itself make the transaction usurious: *Butterfield v. Kidder*, 8 Pick. 512; *Allen v. Turnham*, 83 Ala. 323; *Van Beil v. Fordney*, 79 Ala. 76; *United States Bank v. Waggener*, 9 Pet. 379, 400. But where the verbal agreement is carried into effect by the borrower, at the time of making the loan or subsequently thereto, paying the unlawful interest, or where it appears that the lender, in pursuance of the agreement, has, by any shift or device, reserved or secured a rate of interest in excess of that allowed by law, it will make the transaction usurious, notwithstanding the note given for the repayment of the money borrowed should on its face express a legal rate of interest. Parol evidence is admissible to show the usurious consideration of a note.

In the case at bar the evidence shows, although the trial court did not so find, that when the four original notes were given, eight per cent interest from their date until maturity was paid in advance, and the notes by their terms bore ten per cent interest from their date. This made the contract illegal.

It is also established by the undisputed testimony, and the court in its eleventh finding so found, that the defendants, after the delivery of these four notes, paid interest thereon at the rate of eighteen per cent per annum from their date until January 21, 1883, amounting to \$3,498. When the renewal notes were taken, no credit was given for the interest that had been paid in excess of the legal rate. This made the notes in suit usurious. Does the plaintiff hold the notes free from the defense of usury? The court in the eighth finding of fact finds that the plaintiff purchased them with notice of the consideration for which they were given. It is claimed that this finding is not supported by the evidence. Both notes are negotiable in form. It is conceded that they were purchased by the plaintiff in good faith after maturity, paying therefor their full market value. But it is contended that he purchased from innocent holders, and is therefore protected. Both notes

involved in this case were made payable to W. A. Hagge, and were delivered to him for the use and benefit of the State Central Bank of Grand Island. H. A. Koenig and said Hagge were at that time the sole owners of the bank, the former being president and the latter cashier. Subsequently the State Central Bank ceased to transact a banking business, and about the same time the Citizens' National Bank was organized. Koenig and Hagge have been stockholders in and directors of the last-named bank ever since its incorporation, and have respectively held the positions of president and vice-president. One of the notes in controversy, exhibit B, was sold and indorsed by the State Central Bank to the Citizens' National Bank for value in the usual course of business before maturity. But the trial court finds that the Citizens' National Bank was not an innocent purchaser, but was chargeable with knowledge of the consideration of the note acquired by Koenig and Hagge while acting as president and cashier of the State Central Bank. The evidence shows that they acted for themselves, and not for the Citizens' National Bank, in negotiating the note. The bank in making the purchase was represented by its cashier, D. H. Vieths, who had no notice of any infirmities of the paper. Koenig and Hagge acquired knowledge of the consideration of the note long before the organization of the bank, in the prosecution of their individual business. Knowledge thus acquired did not bind the bank in a transaction where they deal with the corporation as private individuals, unless the knowledge was previously communicated to the bank. They were acting solely for themselves. It would be unreasonable to expect that they would communicate to the corporation the fact that there existed a defense against the note, and it will not be presumed that they did so. We are of the opinion that the Citizens' National Bank was an innocent holder of the note: *Angel and Ames on Corporations*, secs. 308, 309; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *First Nat. Bank v. Christopher*, 40 N. J. L. 435; 29 Am. Rep. 262; *Custer v. Tompkins County Bank*, 9 Pa. St. 27; *Winchester v. Baltimore etc. R. R. Co.*, 4 Md. 231; *United States Ins. Co. v. Shriver*, 3 Md. Ch. 881; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481; 26 Am. Rep. 784; *La Farge F. Ins. Co. v. Bell*, 22 Barb. 54; *Washington Bank v. Lewis*, 22 Pick. 24.

The case last cited was an action upon a promissory note made by Lewis. The defendant made and delivered the note to Thompson, one of the directors of the plaintiff, to procure

the bank to discount it for the maker. Instead of doing that, Thompson pledged it to the plaintiff for a loan made to himself. Lewis received nothing upon the note. It was held that the bank was not bound by the fraudulent conduct of Thompson, and that as he did not act in his capacity as director in the transaction, his knowledge of the circumstances under which the note was procured was not the knowledge of the bank, and did not affect its rights.

Notwithstanding the plaintiff purchased the note from the bank after maturity, he holds it free from any and all defenses available to the makers against the payee; for it has become the settled law of this country, that where a negotiable note is purchased after due from an innocent holder, the purchaser takes the title of and is entitled to the same protection as his indorser: *Bassett v. Avery*, 15 Ohio St. 299; *Simon v. Merritt*, 33 Iowa, 537; *Riley v. Schawacker*, 50 Ind. 592; *Kinney v. Kruse*, 28 Wis. 183; *Hogan v. Moore*, 48 Ga. 156; *Peabody v. Rees*, 18 Iowa, 571; *Bank of Sonoma Co. v. Gove*, 63 Cal. 355; 49 Am. Rep. 92.

An exception to the rule is where the original payee purchases from an innocent holder: *Kost v. Bender*, 25 Mich. 515.

An unsuccessful attempt was made by the defendants on the trial in the district court to show that the Citizens' National Bank was but a reorganization of the State Central Bank; that the former succeeded to the properties and credits of the latter, and that exhibit B was obtained by the first-named bank in that manner, and not by purchase in the usual course of business. The evidence shows that the Citizens' National Bank counted among its numerous stockholders Koenig and Hagge, the sole stockholders of the State Central Bank, but the new bank did not succeed to any of the assets or credits belonging to the old, so far as the evidence discloses, except this one note.

It appears from the findings of the court that the other note, exhibit A, was sold, indorsed, and transferred by the payee before maturity to the United States National Bank, as collateral security for a loan made by it to the payee, without any knowledge or notice on the part of the bank of there being any defense thereto.

The decided cases establish the rule that where a negotiable promissory note is indorsed and transferred before due as collateral security for a loan of money then made, the pledgee who takes the paper without notice of any defense is

a holder for value in the usual course of business. Had the United States National Bank brought suit upon the note, a plea of usury would have been of no avail to the makers: *Colebrook on Collateral Securities*, 5; *Miller v. Pollock*, 99 Pa. St. 202; *Trustees of Iowa College v. Hill*, 12 Iowa, 462; *Ruddick v. Lloyd*, 15 Iowa, 441; 83 Am. Dec. 423; *Stotts v. Byers*, 17 Iowa, 303; *State Savings Ass'n v. Hunt*, 17 Kan. 532; *Railroad Co. v. National Bank*, 102 U. S. 14; *Hunt v. Nevers*, 15 Pick. 500; 26 Am. Dec. 616; *Logan v. Smith*, 62 Mo. 455; *Duncomb v. New York etc. R. R. Co.*, 84 N. Y. 190; *Farwell v. Importers' etc. Nat. Bank*, 90 N. Y. 483; *Roxborough v. Messick*, 6 Ohio St. 448; 67 Am. Dec. 346; *Tarbell v. Sturtevant*, 26 Vt. 513; *Bond v. Wiltse*, 12 Wis. 611; *Lyon v. Ewings*, 17 Wis. 61; *Curtis v. Mohr*, 18 Wis. 615.

The plaintiff claims that he purchased the note from the United States National Bank, and that the finding of the trial court that it had been returned to the Citizens' National Bank of Grand Island, or Koenig and Hagge, and by them sold to the plaintiff, is not supported by the evidence. The testimony shows that it was returned to Koenig and Hagge by the United States National Bank before the plaintiff obtained it. The money was paid by Koehler to Koenig for the note, and the testimony fails to show that it was ever sent to or received by the United States National Bank. Nor does it appear that prior to July 16, 1886, the date of plaintiff's purchase, the loan made by that bank, for which exhibit A was pledged as security, had not been fully paid. It seems to have been liquidated, but at what time the record does not speak. The plaintiff and Koenig in their testimony say that Koenig acted as agent for Koehler in purchasing the notes, but they failed to state any facts that established the relation of principal and agent. They only state conclusions. No explanation is given why Koenig would act as agent for another in the purchase of a note in which he presumably had an interest. The note bears the indorsement of the United States National Bank to plaintiff, but the record is silent as to when the indorsement was made. We are convinced that there is sufficient testimony in the case from which a conclusion could be legitimately drawn that the plaintiff purchased the note of the payee and not from the United States National Bank. The plaintiff having purchased the note after maturity from the payee, he is not an innocent holder, but took the paper sub-

ject to the same defenses that existed between the original parties thereto.

The judgment of the district court is affirmed.

**USURY — VERBAL AGREEMENT CONTEMPORARY WITH NOTE.** — A contract for the loan of a sum of money for a given time at a legal rate of interest is not rendered usurious by a contemporary verbal agreement, not intended as a means of avoiding the usury law, that at the option of the borrower the time of payment may be extended by paying more than the usual rate of interest for the period of extension: *Stein v. Swensen*, 44 Minn. 218.

**NEGOTIABLE INSTRUMENTS — PAROL EVIDENCE REGARDING CONSIDERATION.** — While parol evidence is not admissible to contradict or vary the terms of a promissory note, yet the consideration for which it was given may be established by parol evidence: *Walker v. Haggerty*, 30 Neb. 120.

**USURY — EFFECT ON RENEWAL NOTE.** — Usury in a transaction avoids all subsequent securities growing out of it: *Price v. Lyons Bank*, 33 N. Y. 55; 88 Am. Dec. 368, and note; *Smith v. Stoddard*, 10 Mich. 148; 81 Am. Dec. 778, and note; *Bridge v. Hubbard*, 15 Mass. 96; 8 Am. Dec. 86, and note. Where usurious interest is included in a note given in renewal of a note, the vice of usury will inhere in all subsequent renewals of the note: *First Nat. Bank v. Wayburn*, 81 Tex. 57.

**NEGOTIABLE INSTRUMENTS — PURCHASE AFTER MATURITY FROM BONA FIDE HOLDER.** — The bank purchased the note of the defendant before maturity for value, with no notice of any defenses thereto. After it became due the defendant threatened to set up the defense of fraud, whereupon the plaintiff, president of the bank, purchased the note. He was held to be a *bona fide* purchaser of the note, and took it free from the defense of fraud between parties prior to the bank: *Roberts v. Lane*, 84 Me. 108; 18 Am. Rep. 242. The holder for a valuable consideration of a note without notice of the illegality of the contract for which it was given takes it free from that defense, even though it was past due when he purchased it: *Field v. Tibbette*, 57 Me. 358; 99 Am. Dec. 779. The indorsee of a negotiable instrument past due takes it as it was held by his assignor, and if the latter was a *bona fide* purchaser for value before maturity, the former will take it freed from all equities: *Woodworth v. Huntton*, 40 Ill. 131; 89 Am. Dec. 340, and note; *Howell v. Crane*, 12 La. Ann. 126; 68 Am. Dec. 765, and note.

**NEGOTIABLE INSTRUMENT — PURCHASE AFTER MATURITY FROM PAYEE.** — A promissory note acquired after it has become due is taken subject to all the equities existing between the antecedent parties: *Weathered v. Smith*, 9 Tex. 622; 60 Am. Dec. 186, and note; *Comstock v. Draper*, 1 Mich. 481; 53 Am. Dec. 78; *Snyder v. Riley*, 6 Pa. St. 164; 47 Am. Dec. 452, and note; *Robinson v. Lyman*, 10 Conn. 30; 25 Am. Dec. 52, and note.

**NEGOTIABLE INSTRUMENTS — INDORSEMENT AS SECURITY.** — A negotiable instrument transferred before it is due as collateral security for a pre-existing debt, with no new consideration for such a transfer, is subject to any defense that might have been made as between the original parties: *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464. In this case and the note thereto are collected numerous cases holding the opposite view from that taken on this subject by the principal case. A prior existing debt is a valid consideration for the pledge of negotiable paper as security for the same: *Spencer*

*v. Shan*, 108 Ind. 183; 58 Am. Rep. 35. Negotiable paper transferred as security for the payment of interest to accrue upon a pre-existing debt is subject to all the equities between the original parties to it, and to any defenses which would have been available to the maker had the paper not been transferred: *Leslie v. Bassett*, 129 N. Y. 523.

## HERSHISER v. HIGMAN AND COMPANY.

[81 NEBRASKA, 531.]

**ASSIGNMENT FOR BENEFIT OF CREDITORS — INSOLVENT DEBTOR. — CHATTEL MORTGAGES** executed at the same time by an insolvent debtor to certain of his creditors, giving them priority, but not allowing them to prorate, if made in good faith to secure *bona fide* debts, will not constitute a voluntary and fraudulent assignment for the benefit of the creditors preferred as against those not preferred, although such mortgages cover all the assets of the mortgagor, the value of which exceeds the amount of debts secured.

*A. E. Rice and H. M. Utiley*, for the plaintiff in error.

*M. F. Harrington*, for the defendants in error.

**NORVAL, J.** The defendants in error brought an action in replevin in the district court of Holt County, against the plaintiff in error, to recover the possession of a stock of merchandise which Hershiser, as sheriff, had levied upon as the property of one L. H. Boylan, to satisfy five writs of attachment.

L. H. Boylan, on the seventeenth day of August, 1887, was engaged in the mercantile business at Stuart, Holt County, and being pressed by his creditors, he secured twelve of them; the others he failed to secure. Notes were given by Boylan to the following creditors for the amounts named: —

Kimberly and Wilson . . . . .	\$325 91
George Bowring . . . . .	200 00
C. Shankbey & Co. . . . .	200 00
Tollerton and Stetson Co. . . . .	829 64
J. Feldhenheimer . . . . .	200 00
W. E. Hyman & Co. . . . .	500 00
L. A. Shankland & Co. . . . .	829 00
Peavey Bros. . . . .	84 00
H. B. Boylan . . . . .	400 00
H. E. Stetson . . . . .	24 80
Van Kirwin and Floyd . . . . .	100 00
J. & E. B. Friend Importing Co. . . . .	92 89

Each of the above-named creditors received a note for the

full amount due him, except the defendants in error W. E. Higman & Co., whose note represented one half of the indebtedness to that firm. Two chattel mortgages were made on the entire stock of goods, each securing six of the notes, and in which each creditor and the amount due him was named. On the same day the mortgages were filed for record, and the mortgagees took immediate possession of the property.

On August 18th these mortgages were released and withdrawn from the files, and separate mortgages in the usual form were given upon the same goods to secure each note. The creditors were given priority in the order named above. The mortgagees retained possession of the property until the sheriff levied the writs of attachment at the suits of some of the unsecured creditors. The notes secured by the mortgages amounted to \$2,785.74, and the entire stock of goods was worth from \$3,300 to \$4,000.

The testimony shows that Boylan was insolvent, and that the mortgages covered all his property, including that which was exempt by law.

The cause was tried to a jury, which found a verdict for the plaintiffs for the possession of the property, and assessed their damages at one cent. A motion for a new trial was overruled, and judgment rendered on the verdict. The defendant brings the case here on error.

It fully appears that the mortgages were given to secure *bona fide* debts of the mortgagor, and without any fraudulent purpose. This court in numerous cases has held that it is competent for a debtor to secure one or more creditors to the exclusion of others, where the transaction is not tainted with any fraudulent intent: *Nelson v. Garey*, 15 Neb. 531; *Bierbower v. Polk*, 17 Neb. 268; *Grimes v. Farrington*, 19 Neb. 44; *Davis v. Scott*, 22 Neb. 154; *Ward v. Parlin*, 30 Neb. 376.

The fact that Boylan was insolvent does not affect his right to secure a part of his creditors. They were pressing him for security, and in obedience to their demands the mortgages were executed for the sole purpose of securing the debts he justly owed them. Nor are the mortgages invalidated because they covered all the assets of the mortgagor. True, the value of the property exceeded the amount of the debts secured, but we do not think, under the circumstances of the case, that the excess was so great as to make the mortgages fraudulent as to his unsecured creditors. Considerable margin should be allowed for costs and expenses. Besides, property like that

in controversy seldom, if ever, brings at forced sale its full value.

Some of the provisions of our assignment law have a bearing upon the question involved herein. Sections 42 and 43 of that law are as follows:—

“Sec. 42. If a person, being insolvent or in contemplation of insolvency, within thirty days before the making of any assignment, makes a sale, assignment, transfer, or other conveyance of any description of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede, or delay the operation and effect of, or to evade any of, said provisions, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the assets of the insolvent. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief.

“Sec. 43. If a person, being insolvent, or in contemplation of insolvency, within thirty days before the making of the assignment, with a view to give a preference to a creditor, or person who has a claim against him, procures any part of his property to be attached, sequestered, or seized on execution—or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent, or in contemplation of insolvency, and that such payment, pledge, assignment, or conveyance is made in fraud of the laws relating to insolvency, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited.”

The above provisions do not in any manner affect mortgages given to preferred creditors more than thirty days before the making of an assignment, but such mortgages are valid unless followed by an assignment within thirty days after the same are given. But the provisions of sections 42 and 43 must be



construed in connection with those of section 44 of the same act, which provides that "nothing in this act contained shall be construed so as to prevent any debtor from paying or securing to be paid any debt not exceeding the sum of one hundred dollars for clerks' or servants' wages, or from paying or securing any debt which shall have been created within nine months prior to the date of such payment or securing, or to affect any mortgage or security made in good faith to secure any debt or liability created simultaneously with such mortgage or security, provided any such mortgage shall be filed for record in the proper office within thirty days from its date."

It will be observed that a chattel mortgage given to secure any debt mentioned in the last-quoted section is not invalid, although the same was given less than thirty days prior to the making of an assignment, provided the mortgage is filed for record within thirty days from its date.

The three sections quoted are the only ones on the statute books which prohibit debtors from preferring creditors, excepting section 29 of the assignment law. The first subdivision of this section provides that "every such assignment shall be void against the creditors of the assignor if it gives a preference of one debt or class of debts over another, except a preference to any person of not more than one hundred dollars for labor or wages."

The purpose and object of the law-making body in enacting the assignment law was to secure an equitable distribution of the property of an insolvent debtor among all his creditors in case he makes an assignment. For that purpose section 29 was passed, prohibiting an assignor from preferring his creditors. We suppose where a debtor gives a mortgage to secure any indebtedness referred to in section 44, at or about the time of his making an assignment and as a part of the same transaction, that the mortgage would be invalid.

It is claimed that the mortgages, being made at the same time, covering all of Boyland's property, make the transaction a voluntary assignment for the benefit of creditors, within the meaning of the assignment law, and void on account of preference. Did the giving of the chattel mortgages, under the circumstances already stated, constitute an assignment within the spirit of the assignment law? This question was answered in the negative in *Davis v. Scott*, 22 Neb. 154. In that case R. N. Townsend gave seven chattel mortgages on the same

day to as many creditors to secure *bona fide* debts. They were filed for record, and on the next day the sheriff levied attachments upon the mortgaged goods as the property of Townsend & Co. The assignee of the mortgages soon thereafter brought replevin and obtained possession of the goods. The court, in the *syllabus*, says: "A debtor has the right to prefer his creditors, and to pay or secure those preferred. The execution of chattel mortgages to preferred creditors, if made in good faith to secure *bona fide* debts, even if made to a considerable number of such creditors at or about the same time, — no trust being created, — will not constitute an assignment for the benefit of creditors, if not so intended."

The same case was again before the court, and the mortgages were sustained: *Davis v. Scott*, 27 Neb. 642.

The mortgages in the case at bar were not intended as an assignment. Boylan transferred his property by mortgages to his creditors direct, to secure *bona fide* debts. No trust was created, and the creditors were not to prorate. The same firm of attorneys represented the preferred creditors in taking the mortgages, and the goods being delivered to the attorneys was, in contemplation of law, a delivery to the mortgagees.

In *Gage v. Parry*, 69 Iowa, 605, an insolvent firm, with the *bona fide* intention of securing particular creditors, executed three several chattel mortgages to three creditors, respectively, upon their entire stock of merchandise. At the same time the firm assigned all their book-accounts to a fourth creditor. Subsequently on the same day they concluded to and did make a general assignment. The mortgages covered all the property of the firm excepting the book-accounts. It was held that the executing of the mortgages and the assigning of the accounts did not operate as an assignment for the benefit of creditors, and that the mortgages were valid.

In *Menzesheimer v. Kennedy*, 75 Wis. 411, an insolvent debtor executed two chattel mortgages, one to each of two creditors, on substantially all his property, not exempt, to secure the amount of his indebtedness to them. Two days later the mortgagees took possession of the property, and the same was subsequently seized by the sheriff by virtue of several writs of attachment issued in actions brought by other creditors. It was held that the mortgages did not constitute a voluntary assignment, and were valid.

To a similar effect are *Carter v. Rewey*, 62 Wis. 552; *Hoey v. Pierron*, 67 Wis. 262; *Chicago Coffin Co. v. Maxwell*, 70 Wis.

282; *Ingram v. Osborne*, 70 Wis. 195; *Fecheimer v. Robertson*, 53 Ark. 101; *Farwell v. Howard*, 26 Iowa, 381; *Kohn v. Clement*, 58 Iowa, 589; *Cadwell's Bank v. Crittenden*, 66 Iowa, 237; *Watterman v. Silberberg*, 67 Tex. 100; *Tootle v. Coldwell*, 30 Kan. 125; *Doremus v. O'Harra*, 1 Ohio St. 45; *Atkinson v. Tomlinson*, 1 Ohio St. 241; and *National Bank v. Sprague*, 20 N. J. Eq. 28.

The case of *Bonns v. Carter*, 20 Neb. 566, is cited by the plaintiff in error. The facts in the case at bar do not bring it within the principles of that decision. In that case the debtor executed a chattel mortgage on his stock of merchandise to Bonns as trustee for seven creditors of the mortgagor. The mortgage authorized the trustee to take immediate possession of the goods, sell the property, and apply the proceeds to the payment of the preferred creditors *pro rata*. The mortgage was held to be an assignment for the benefit of creditors, and void on account of preference. The decision was placed upon the ground that a trust was created by the mortgage. That element is absent in this case.

Another case cited in brief of plaintiff in error is *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257. There the debtors, as one transaction, transferred all their property not exempt, by means of six chattel mortgages and five assignments, to secure certain creditors. One of the mortgages and one of the assignments were made to one Frank M. Hoyt to secure an indebtedness of the mortgagors to the Wisconsin Marine and Fire Insurance Company Bank. The instruments were made with the understanding that Hoyt, for himself and as trustee for the other creditors, should take immediate possession of the property, convert it into money, and divide the same *pro rata* among the preferred creditors. If there was anything left after paying the claims, it was to go to the unsecured creditors. It was held that the instruments should be construed together, and when thus construed the transaction was in effect a voluntary assignment. In the present case the creditors were not to prorate, and a mortgage was made direct to each creditor. No trust was created. In these material respects this case differs from *Winner v. Hoyt*, 66 Wis. 227; 57 Am. Rep. 257. That case has been distinguished by the supreme court of Wisconsin in the opinions rendered in some of the cases cited above.

In *Preston v. Spaulding*, 120 Ill. 208, it appeared that an insolvent firm, on the same day that it made an assignment

for the benefit of its creditors, preferred certain of its creditors by giving judgment notes. The making and delivery of the notes and the preparing of the assignment were carried on at the same time. The notes were delivered, judgments rendered, and executions levied before the deed of assignment was filed for record. It was held that the judgments were preferences, within the meaning of the assignment law of Illinois, which declares that all preferences in any assignment shall be void. We do not question the soundness of that decision. Such a transaction would be void under our statute. In the present case the facts differ so materially from those in *Preston v. Spaulding*, 120 Ill. 208, as to take it out of the rule therein announced.

In each of the cases of *Richmond v. Mississippi Mills*, 52 Ark. 30, and *Appeal of Miners' Nat. Bank*, 57 Pa. St. 193, the property was conveyed to a trustee to sell, and with the proceeds to pay certain preferred creditors. These cases are directly in line with the decision in *Bonns v. Carter*, 20 Neb. 575.

In the present case the evidence conclusively shows that the mortgages were made in good faith to secure actual debts of the mortgagor. No fact or circumstance is disclosed by the record which tends in the least degree to impeach the good faith of Boylan or the preferred creditors. The mortgages were in the usual form. No trust was created. We therefore conclude that the mortgages did not constitute an assignment for the benefit of creditors.

The judgment of the district court is affirmed.

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**FRAUDULENT CONVEYANCES—CHATTEL MORTGAGE PREFERRING CREDITORS.**—A chattel mortgage executed in good faith in favor of a *bona fide* creditor is not necessarily fraudulent and void as to other creditors of the insolvent mortgagor, although it exhausts his property, and its effect is to hinder or delay them, or prevent them from enforcing their claims; *First Nat. Bank v. Eidenow*, 46 Kan. 718; 26 Am. St. Rep. 167, and note.

CHICAGO, BURLINGTON, AND QUINCEY RAILROAD  
COMPANY v. MOORE.

[31 NEBRASKA, 629.]

**GARNISHMENT IN ANOTHER STATE.** — A judgment in a garnishment suit, valid and binding upon the parties thereto, is entitled to full faith and credit in another state, and cannot be collaterally attacked. Payment and satisfaction of such judgment by the garnishee is a complete defense for him to an action in another state to recover the same debt.

*Marquett and Dewees, and A. G. Greenlee, for the plaintiff in error.*

*H. H. Blodgett, for the defendant in error.*

**NORVAL, J.** This suit was tried in the Lancaster County district court upon the following stipulation of facts:—

“It is hereby stipulated between the plaintiff and the defendant in the above-entitled cause that the following are the facts in this cause: It is agreed that the plaintiff commenced working for the defendant for a price agreed upon by and between them, to be \$50 per month, and in pursuance of said contract the plaintiff worked two days in the latter part of March and fifteen days in the fore part of April, 1888, amounting to \$25.92, and that this sum is now due from the defendant to the plaintiff, unless the following facts, stipulated on behalf of the defendant, constitute a defense: On the sixteenth day of April, 1888, one G. W. Groves commenced suit against the plaintiff herein before E. S. Barnett, justice of the peace in and for the city of Council Bluffs, Pottawattamie County, Iowa, and attached the wages due from this defendant to the plaintiff. Notice of garnishment in said attachment suit was served upon this defendant on said sixteenth day of April, 1888. On the twenty-fifth day of April, 1888, this defendant answered as garnishee in said suit, showing an indebtedness to this plaintiff of \$25.92; whereupon this defendant was ordered by said court to hold the money then in defendant's hands to abide the further order of the court, and the hearing was continued to June 25, 1888. On the eighth day of May, 1888, this suit was commenced before W. H. Snelling, J. P., in and for the city of Lincoln, Lancaster County, Nebraska, to recover the wages sued for in this action. On the twenty-ninth day of May, 1888, this defendant, as garnishee in the suit pending in Iowa, appeared before said E. S. Barnett, J. P., and by leave of court filed an amended answer setting up that since the be-

ginning of the action in that court this action had been begun in the city of Lincoln for the recovery of these wages, before W. H. Snelling, J. P., in and for this city, and that a judgment had been rendered in favor of this plaintiff for the sum then due. On the twenty-fourth day of August, 1888, said G. W. Groves, having duly served the plaintiff herein in the suit pending in Iowa by publication, obtained judgment against this plaintiff as a non-resident, and rendered judgment against this defendant, as garnishee, for the sum of \$25.92, and issued an order for the payment of the same into that court; whereupon this defendant paid into said court of E. S. Barnett, J. P., the sum of \$25.92, being the amount then due from this defendant to this plaintiff. (The said Barnett was a regularly elected and qualified justice of the peace in and for the city of Council Bluffs, Pottawattamie County, Iowa, and had jurisdiction in all civil cases at law where the amount in controversy does not exceed one hundred dollars.) It is further agreed that the contract by which this plaintiff entered into the service of this defendant was made in the city of Lincoln, state of Nebraska; that the work was performed in the city of Lincoln, and it was the custom of this defendant to pay the wages of the plaintiff and of others in its employ, whose wages had been earned in said city, in the city of Lincoln; that before and since that time the wages of the plaintiff had been paid by this defendant in the city of Lincoln, under which the wages sued for in this action were earned; that this plaintiff had not been in the state of Iowa at any time since the twenty-ninth day of March, 1888; that no service has been had upon the plaintiff in the suit pending in the state of Iowa, except the service by publication required by the statutes of Iowa, and this plaintiff has never made any appearance in the action pending in the state of Iowa, heretofore mentioned.

"It is further stipulated that the debt for which this plaintiff was sued in said justice court of E. S. Barnett was contracted with one A. D. Lange, for groceries, in the town of Seward, state of Nebraska, and was assigned to G. W. Groves, of Council Bluffs, Iowa, the plaintiff in that action.

"It is further agreed that this plaintiff is the head of a family, and at all times a resident of Nebraska, and that by the laws of the state of Nebraska his wages, the matter in controversy, are exempt from execution or attachment, and that he has no other property. It is further stipulated that by the laws of Iowa the wages of a non-resident are not exempt from execu-

tion or attachment. And it is hereby agreed that this cause may be tried to the court, a jury being hereby waived."

A judgment was rendered against the railroad company for \$25.92 and costs, to reverse which it prosecutes a petition in error. It appears from the agreed statement of facts that the defendant company was compelled, by garnishment proceedings brought in a justice court at Council Bluffs, Iowa, to pay the money sought to be recovered in this action. The sole question, therefore, involved in this case is this: Is the judgment in garnishment a bar to this suit?

It is admitted that Moore is the head of a family and a resident of this state, and that he worked for the defendant company seventeen days, amounting to \$25.92. Under our statutes these wages are exempt from garnishment in this state. Whether or not this exemption follows the debt, the decisions in this country are conflicting. In *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175, 56 Am. Rep. 747, it was held that where a debt is contracted in another state by whose laws it is exempt from attachment, execution, and garnishment, the exemption will continue in this state in case an action is brought on the claim. The doctrine of that case is sustained by the following authorities in addition to those cited in that opinion: *Pierce v. Chicago etc. R'y Co.*, 36 Wis. 233; *Commercial Nat. Bank v. Chicago etc. R'y Co.*, 45 Wis. 172; *Drake v. Lake Shore etc. R'y Co.*, 69 Mich. 168; 13 Am. St. Rep. 382; *Louisville etc. R. R. Co. v. Dooley*, 78 Ala. 524.

The court of last resort in the state of Iowa has uniformly held that exemption laws have no extraterritorial force. In other words, that in garnishee proceedings brought in the courts of that state, it is no defense that the debt owing by the garnishee is exempt by the laws of the state where the garnishee and defendant both reside: *Newell v. Hayden*, 8 Iowa, 140; *Leiber v. Union Pac. R'y Co.*, 49 Iowa, 688; *Mooney v. Union Pac. R'y Co.*, 60 Iowa, 346; *Broadstreet v. Clark*, 65 Iowa, 670. The Iowa rule has been adopted in some of the other states: *Burlington etc. R. R. Co. v. Thompson*, 31 Kan. 180; 47 Am. Rep. 497; *Morgan v. Neville*, 74 Pa. St. 52.

If the proceedings in garnishment are valid and binding in Iowa, they are conclusive upon the parties thereto in this state, notwithstanding the debt condemned by judgment in garnishment would have been exempt in this state. The material inquiry, therefore, is, Did the Iowa court obtain jurisdiction

over the debt here sued for, so as to subject it to the claim of the plaintiff in garnishment?

It appears that in the suit commenced by Groves against Moore in the justice court in Iowa, notice of garnishment was duly served upon the railroad company; that it appeared and answered, disclosing its indebtedness to Moore in the sum of \$25.92, and in obedience to the order of the justice the company paid the money into court. Moore was also duly served by publication, and judgment was rendered against him as a non-resident. These facts, under the statutes and decisions of Iowa, conferred jurisdiction over the debt due from the garnishee.

A similar question was decided by the supreme court of Iowa in *Mooney v. Union Pac. R'y Co.*, 60 Iowa, 846. The plaintiff sued one C. F. Rollins, and garnished the railroad company. The garnishee was indebted to Rollins for wages earned in this state. He was hired in Nebraska, and it was the custom of the company to pay the wages of such employees here. Service of notice was made upon Rollins in this state, which conferred the same jurisdiction as would service by publication. Garnishment process was served upon the company in Pottawattamie County, Iowa. Mooney and Rollins were both residents of Nebraska, and plaintiff knew when he commenced the suit that two months' wages of the defendant were exempt by the laws of this state. Judgment was rendered in the trial court against the garnishee and Rollins. It was held that the court had jurisdiction to render the judgment, and that the garnishee was liable.

*Moore v. Chicago etc. R. R. Co.*, 43 Iowa, 885, is predicated upon facts similar to those in the case at bar. The defendant in that case was a corporation existing under the laws of Iowa and Illinois, and operated its road in said states, and a connecting line of road in Kansas and Missouri. The company became indebted to the plaintiff in the sum of \$14.62 for labor performed for it in Iowa, in which state he resided with his family. By the laws of Iowa his wages were exempt, but under the statutes of Missouri were liable to execution or attachment. Harry Barton sued the plaintiff before a justice of the peace in Missouri, and garnished his wages in the hands of the railroad company. Service of notice was made upon Moore by publication. The railroad company answered that it was indebted to Moore in the above sum, and the justice rendered judgment against Moore, and also against the railroad com-



panty as garnishee. Subsequently Moore brought suit in Iowa to recover from the railroad company the same debt. The court held that the judgment rendered against the garnishee in Missouri was a complete bar to the suit.

The judgment in the garnishment suit set up by the plaintiff in error, being valid and binding upon the parties thereto in the state where rendered, is entitled to full faith and credit in this state, and cannot be collaterally attacked. The plaintiff in error having paid and satisfied that judgment, it is a complete defense to this action: *Drake on Attachment*, sec. 706; *Allen v. Watt*, 79 Ill. 284; *Morgan v. Neville*, 74 Pa. St. 52; *Moore v. Chicago etc. R. R. Co.*, 43 Iowa, 385; *Grosslight v. Crisup*, 58 Mich. 531; *Barrow v. West*, 23 Pick. 270.

In reaching the conclusion we have, we do not overrule or in any manner modify the rule laid down in *Wright v. Chicago etc. R. R. Co.*, 19 Neb. 175; 56 Am. Rep. 747. We are simply giving such faith and credit to the judgment of a sister state as comity between the states demands. The defendant in error has his remedy by action against Lange, if the latter assigned his claim to Groves for the purpose of bringing suit in Iowa and to evade the exemption laws of Nebraska: *Albrecht v. Treitschke*, 17 Neb. 205.

The judgment of the district court is reversed and the action dismissed.

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**GARNISHMENT IN ANOTHER STATE.** — A resident indebted to a non-resident may be garnished in the courts of the state of the former's residence, and a judgment legally rendered there against him will bind the sum in his hands, although the non-resident creditor was cited to appear only by publication. Payment by the garnishee under such a judgment is conclusive against such a creditor: *Berry v. Davis*, 77 Tex. 191; 19 Am. St. Rep. 748, and note. For discussion of the extraterritorial effect of exemption laws, see *Mumper v. Wilson*, 2 Am. St. Rep. 240. Collateral attack on foreign judgments is discussed in the note to *Morrill v. Morrill*, 23 Am. St. Rep. 117.

**OPPENHEIMER AND COMPANY v. MARR.**

[11 NEBRASKA, 511.]

**GARNISHMENT OF OFFICER.** — THE SURPLUS PROCEEDS OF THE SALE OF PROPERTY in the hands of an officer of the court, after satisfying an execution or other process, belongs to the judgment debtor, is not *in custodia legis*, and is therefore subject to garnishment or attachment by his creditor.

*George E. Banks*, for the plaintiff in error.

*J. W. Cole*, for the defendant in error.

COBB, C. J. This cause is on error from the county of Hitchcock.

Proceedings in garnishment against Thomas H. Britton were taken on error to the district court of said county on June 15, 1889, by the plaintiffs, alleging that on April 21, 1889, they recovered a judgment before W. A. Connett, justice of the peace of Culbertson precinct, against the defendant Marr for \$104.25, and \$3.50 costs, on which execution was issued, and returned "no goods or chattels found whereon to levy." Affidavit of garnishment followed, and summons was issued and served on defendant Britton, who appeared on June 7, 1889, and answered that he had sixty-two dollars in his possession due to the defendant. On cross-examination it was discovered that the garnishee was the sheriff of the county, and that the money due the judgment debtor was for the pasturage, keeping, and care of certain live-stock, taken in execution against Rebecca Marr, at the suit of the Kalamazoo National Bank, and was part of the proceeds of the sale of the stock under the execution. The justice held that the money was in the garnishee's hands as sheriff, and was not subject to garnishment, and the garnishee was discharged from liability. A transcript of the proceedings was taken to the district court on error, and on November 16, 1889, there was a trial to the court, and the judgment of the court below was affirmed, with costs against the plaintiffs.

The plaintiffs' assignment of error is, that the district court erred in affirming the judgment of the justice of the peace and in discharging the garnishee.

From the record it appears that the garnishee, as sheriff, on May 1, 1889, having levied upon and taken on execution twenty head of cattle, seven head of fat steers, one span of mares, and one Clydesdale stallion, employed the judgment debtor to pasture, feed, and care for the stock, subject to the

garnishee's order, for the sum of two dollars per day. On the second and third days of June, following the days of sale of the property, there was due the judgment debtor on this account sixty-two dollars. On June 3d, during the progress of the sale, the garnishee was served with summons from the justice's court. On the 4th of June he made return of the execution, taxed the cost of keeping the stock sixty-two dollars, and retained it. On the 7th of June he answered as garnishee in the justice's court. His contract for the care of the live-stock was a personal one, for which he was personally responsible under all circumstances, and was unattended by the authority or jurisprudence of the court. While he was legally entitled to tax the costs of levy and sale against the proceeds of the property, and incidentally to include that of keeping and protecting it, the money in his hands, or to come into his hands, for that purpose, was never at any time in *custodia legis*, in the sense that it was not subject to the authority of any other competent court. It was but a debt due from the sheriff to his contractor and creditor. If, however, it may be regarded as "in the custody of the law," and is a remainder in the hands of the sheriff after satisfaction of all other costs, would it be exempt from attachment? Sections 224 and 939 of the Civil Code bind the garnishee for all property or money he may have in possession owing to the defendant at and after the service of the writ and notice.

The rule in *custodia legis* applies only where the sheriff is bound to have the money in hand to pay the execution plaintiff, and not to cases in which he has in his possession, after satisfying the execution, a surplus of money from the sale of property. Such surplus is the property of the execution defendant, and being held by the sheriff in a private and not in an official capacity, it may be attached in his hands: Drake on Attachment, 281.

"Judgment debts and moneys collected on execution in the hands of a sheriff are liable to attachment under process against the judgment creditor": *Wehle v. Conner*, 83 N. Y. 281.

"The surplus proceeds of property in the hands of an officer of the court, after satisfying the execution or other process, belongs to the defendant, who is entitled to it without an order of the court, and is therefore subject to garnishment by a creditor: *Leroux v. Baldus*, Tex., May 2, 1890, 13 S. W. Rep. 1019.

In the case of *Weaver v. Cressman*, 21 Neb. 679, it was laid

down in the opinion of the then chief justice, that "while the general rule is, that money paid into the hands of the clerk of a court on a judgment, and money in his possession by virtue of his office, cannot be attached, yet there are exceptions to this rule, as where money was in the hands of the clerk from the sale of lands in partition which had been ordered to be paid over to the parties, and no doubt a court of equity, in a proper case, would subject funds in the hands of a clerk, belonging to a debtor, to the satisfaction of a creditor's claim."

The most comprehensive rule as to garnishment would seem to be that laid down in the Nebraska Pleading and Practice, p. 509, that "a person who holds money subject to certain conditions, upon the fulfillment of which it is to become the property of a third party, is not liable as garnishee in an action against the latter until the conditions have been fulfilled." And when those conditions are complete, we hold that he is liable, subject to the legal exceptions laid down by the author. There is to be a limit even to the rule of judicial custody, and that limit is reached, as in this case, when the judgment and costs are satisfied, and the remainder, in the hands of the sheriff, is subject to garnishment as money acknowledged to be due to this judgment debtor. The court has discharged its functions, has satisfied its suitors, and is no longer custodian of the costs of levy and sale which had become the perquisites of those entitled to them.

The judgment of the district court is reversed, and the cause is remanded to that court, which is ordered to enter a judgment for the plaintiff in error against Thomas H. Britton, as garnishee, for the sum of sixty-two dollars, with interest from June 7, 1889.

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**EXECUTION — SURPLUS PROCEEDS OF SALE.** — Funds in the hands of a sheriff, belonging to a defendant in execution or attachment, and payable to him, are not protected from attachment under the principle of *custodia legis*, and may be levied on: *Roddy v. Erwin*, 31 S. C. 36. Where an officer has levied his execution against property and has taken it into possession, other officers having like executions may afterwards make constructive levies upon the same property, and though not entitled to possession, they are entitled to have the property or the proceeds of the sale thereof applied to the satisfaction of their executions after the execution first levied has been satisfied: *Penland v. Leatherwood*, 101 N. C. 509; 9 Am. St. Rep. 38. The court has control over surplus money arising on a sheriff's sale if the property at the time of the sale was bound by subsequent judgments or executions: *Stebbins v. Walker*, 14 N. J. L. 90; 25 Am. Dec. 499, and note.

CASES  
IN THE  
COURT OF APPEALS  
OF  
NEW YORK.

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**KALLEY v. BAKER.**

[122 NEW YORK, 1.]

**BROKER EMPLOYED TO SELL PROPERTY BECOMES ENTITLED TO HIS COMMISSION** when he finds a purchaser satisfactory to his employer and they enter into a mutual contract of purchase and sale, though it subsequently turns out that the purchaser is unable to comply with his contract, and on that account the sale is not consummated by the transfer of the property.

*Albert Allan Abbott*, for the appellant.

*William J. Gaynor*, for the respondents.

**FOLLETT, C. J.** This action was begun to recover commissions alleged to have been earned by the plaintiffs in procuring the execution of a contract between the defendant and one Humphery, for the exchange of real estate.

In 1889, and for some years prior thereto, the defendant owned a farm in the state of Massachusetts, and Ann O. Humphery an apartment-house on the north side of Remsen Street, in the city of Brooklyn, known as the Aldine, in which there was certain personal property.

February 18, 1889, the defendant and Humphery entered into a written contract, by which they agreed to exchange properties, both to be free from all encumbrances, except the Aldine was to be subject to two mortgages amounting to fifty-five thousand dollars, on the 1st of April, 1889, on which day the defendant was to convey the farm to Humphery, and she the Aldine to the defendant.

The parties to the contract met on the day and at the place

appointed, the plaintiffs' office, and a deed was tendered by Mrs. Humphery to the defendant, who raised the following objections to the title: 1. That \$990 of interest was unpaid on the mortgages, and the taxes, amounting to \$1,389.83, were unpaid; 2. That Mrs. Humphery was a married woman, and her husband had not joined in the deed; 3. That a former owner of the Aldine was a married woman, and that her husband did not join in the deed which was executed by her April 2, 1888; 4. That the bill of sale of the furniture in the Aldine, which was to go to the defendant, was not subscribed at the end, but at about the middle of the document.

These were the only objections specifically made on the 1st of April, 1889. On the trial the defendant raised other objections: 1. That the deed tendered by Mrs. Humphery recited that the land was subject to an agreement, entered into by a former owner with the owner of an adjoining lot, that a party-wall should be maintained, one half on the land of each, and for the mutual benefit of both properties; 2. That the deed to Mrs. Humphery recited that the land was subject to a restriction, imposed by a former owner of this lot and the adjoining lots, that no buildings should be built on those lots within eight feet of the north line of the street.

The defendant rejected the title offered by Mrs. Humphery, and the contract to exchange was never performed.

The question underlying all others in this case, and which is decisive of it, is, Was it the understanding of the parties to this action that the plaintiffs were not to be entitled to commissions unless mutual conveyances of the properties contracted to be exchanged were made and accepted, or whether they were entitled to commissions when the contract of exchange was executed?

It appears by the record that the defendant, in 1882, employed the plaintiffs to effect a sale of his farm, and that for some time before the negotiations were begun which resulted in the contract to exchange, the owner of the Aldine had employed the plaintiffs to sell it. It is alleged in the complaint that \$750 was the value and the agreed price of the services rendered by plaintiffs for the defendant. The defendant in his answer denied that he agreed to pay any definite sum, but alleged that he "agreed that if plaintiffs should be instrumental in effecting a sale of said property upon such terms and for such consideration as might be satisfactory and agreed upon by the defendant, and not otherwise, that he, the defend-

ant, would pay to the plaintiffs a reasonable commission for their said services."

It was also alleged in the answer that February 18, 1889, the defendant and Humphery entered into a contract (a copy of which is annexed to the answer) to convey, April 1, 1889, his farm, valued at thirty thousand dollars, to Humphery, in consideration that she would convey to the defendant the Aldine, together with the furniture therein, free and clear from all encumbrance, except two mortgages amounting to fifty-five thousand dollars. The defendant also alleged that Humphery was unable to and never had performed her contract.

The defendant testified that Julius N. Kalley, one of the plaintiffs who transacted all the business in respect to the exchange, spoke to him about the Aldine about December 20, 1888, and that afterwards he reported to Kalley that he had examined it. The result of his examination and of subsequent conversations was, that Kalley, Humphery, and the defendant went, some time in the month of February, 1889, to Massachusetts and examined the defendant's farm. Kalley testified that a day or two after returning from Massachusetts the defendant and Humphery met at the office of plaintiffs, and the result of their interview was the written contract of exchange. He said: "Q. Did they (defendant and Humphery) personally carry on their negotiations face to face? A. They did,—yes, sir. Q. They entered into a contract? A. Yes, sir. Q. Is that the contract mentioned in the answer here? A. Yes, sir." This witness also testified that at an interview before the parties went to Massachusetts the following conversation was had: "Q. What did he, defendant, say? A. He says, 'If I will make a change for property down there, what will be your charge?' He seemed to hammer on this. By the Court: No, not what he seemed; just state what he did absolutely say and what you said. A. He said, 'What will be your charge in case you make an exchange?' I said, 'The price of two and a half per cent on the value, thirty thousand dollars, which you put on the farm.'" Upon this question, the defendant testified: "Q. What did he (Kalley) say? A. He said that he thought he could exchange my property free and clear for that property, free and clear of all encumbrances, except two mortgages upon it for fifty-five thousand dollars. Q. What did you say? A. I will think of the matter. Q. What was the next said between you about it? A. Nothing further at that time. Q. Well, the next time? A. The next

time I told him that if I could exchange my property free and clear for the Remsen Street flat, free and clear from all encumbrances, except the two mortgages. Q. By the Court: For how much? A. Two mortgages for fifty-five thousand dollars, I would do so, but I would not give him any personal property with my farm, and that if the exchange was made, I would pay him a commission. Q. What commission? A. No amount agreed upon. Q. Anything stated by him on that subject? A. He said the commission for out-of-town property was two and a half per cent."

There is no evidence that the plaintiffs knew anything about the title to the Aldine,—that they made any representations in respect to it; nor does it appear that the defendant asked them to make, or cause to be made, a search.

The trial court submitted the question as to what the agreement was to the jury, instructing them as follows: "In ordinary cases, the law is well settled, where a broker is employed in reference to a sale or exchange of real estate, that when he brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property on the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, then the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete his contract. . . . Therefore, I say to you, in the absence of any express agreement to the contrary, the law is, that the broker is entitled to his commissions when the vendor accepts, when he (the broker) brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him. The contention is, that there was a different agreement here. . . . Now, I propose to leave that question to you to determine. If you find that this was an ordinary contract, made without any conditions, the broker employed in the usual way, and that there was no bargain entered into between the plaintiffs and Mr. Baker, that they were only to be paid their commissions in case this sale went through, then plaintiffs are entitled to recover. If, however, the bargain agreed upon between Mr. Kalley and Mr. Baker was, that commission was only to be paid in case this whole transaction went through, as provided by the terms of the contract of exchange, the plaintiff is not entitled to recover unless you are satisfied from



the evidence here that Mr. Baker capriciously refused to carry out the contract."

To this instruction the defendant took no exception except to that part of it which laid down the rule that ordinarily the broker "is entitled to commissions when the parties have been found satisfactory to each other, and they have entered into a mutual contract of purchase and sale."

This exception presents no error. In *Knapp v. Wallace*, 41 N. Y. 477, the defendant employed a broker to purchase certain real estate for a price named, agreeing to pay him one per cent on that price for his services. Through the aid and assistance of the broker a contract of sale at the price named was entered into personally between the defendant and the owner of the property. As a defense to an action brought to recover the commissions, the defendant sought to show that the title of the vendor was defective, and for that reason he was unable to perform his contract. It was held "it was no defense to the plaintiff's claim that the title to the property was defective. Messmore (the broker) had not undertaken that it should be good. The contract between him and defendant did not place his right to compensation on such a condition."

When a broker, as a part of his employment, assumes to execute for his principal an executory contract of sale or exchange, he does not become entitled to his commissions unless the other contracting party is able to perform the contract on his part: *Barnes v. Roberts*, 5 Bosw. 73; *McGavock v. Woodlief*, 20 How. 221.

But under the facts found, these and kindred cases have no application to this case.

The judgment should be affirmed, with costs.

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**BROKER, WHEN ENTITLED TO COMMISSION:** See note to *Ward v. Cobb*, 148 Mass. 518; 12 Am. St. Rep. 587. The general rule is, that when a broker is employed, for a commission to be paid, to procure a purchaser for property, and presents to the principal a proposed purchaser, it is for the principal then to decide whether the person presented is acceptable, and that if, without any fraud, concealment, or other improper practice on the part of the broker, the principal accepts the person presented, and enters into an enforceable contract with him, the commission is fully earned: *Francis v. Baker*, 45 Minn. 83. The solvency and ability of such purchaser to perform the obligations of his contract are presumed until the contrary is proved: *Gross v. Cooley*, 43 Minn. 188. But an unqualified acceptance by him must be shown: *Hannan v. Fisher*, 82 Mich. 208. After the vendor and purchaser have thus come to an agreement, the broker cannot be deprived of his compensation by any act or omission of the principal; as where the vendor refuses, without just cause, to fulfil the contract: *Greenwood v. Burton*, 27 Neb. 803; *Fiske v. Soule*,

87 Cal. 313; *O'Brien v. Gilleland*, 79 Tex. 602; or where he has placed land for sale on commission, knowing that a portion of it belongs to another person, and refuses to give a deed unless he is paid for that portion: *Cawker v. Apple*, 15 Col. 141; or where he fails to make a good title: *Kyle v. Rippey*, 20 Or. 447; even though the contract provides that no commissions shall be paid until the sale is consummated by delivery of the deed: *Gauthier v. West*, 45 Minn. 192. Nor is a contract to pay to an agent for the sale of a reservoir-dam site a certain share of the purchase price, whether the sale is effected by the agent or principal, defeated or affected by the fact that the principal had only a possessory title to the land at the date of the contract, and thereafter procured the legal title thereto, and sold it as land: *Campbell v. Thomas*, 87 Cal. 428. But if the contract provides in terms that the commission is to be paid only on the consummation of the sale, the agent cannot recover any commission, where the principal refuses to complete the sale on reasonable grounds, as, for example, because of a newly discovered want or defect of title, or on account of an honest doubt as to his title: *Flower v. Davidson*, 44 Minn. 46. A contract in writing which authorizes the brokers "solely to sell" upon certain commissions will be construed as simply conferring upon them the exclusive right to sell, and not as making the payment of their commission contingent upon the actual consummation of the sale: *Smith v. Schiele*, 93 Cal. 144. But if the agent complies with his part of the contract in procuring the purchaser, his right to recover his commission does not depend upon whether the power conferred on him is to sell or merely to secure a buyer: *Fiske v. Soule*, 87 Cal. 313; *Stephens v. Scott*, 43 Kan. 285.

If the broker introduces a purchaser to the seller, and a sale is effected through that introduction, the commission is earned, though sale is made by the owner himself: *Scott v. Patterson*, 53 Ark. 49. Where the agency to sell extends over a year, and it is provided that the commission shall be payable if the owners of the land shall withdraw the property from sale or sell it during the year, the brokers are entitled to their commission upon a sale or exchange of the land by the owners themselves, and need not show that they have produced or could have produced a purchaser within the time fixed in the contract: *Crane v. McCormick*, 92 Cal. 176. The agent's rights are the same if the sale is effected through another agent: *Dobinson v. McDonald*, 92 Cal. 33. If the vendee pays part of the purchase-money, enters into possession, and is granted the privilege of selling any portion of the lands purchased, this constitutes a sale sufficient to create a liability in favor of the brokers, though the purchaser afterwards surrenders the contract and delivers up possession: *Shaimwald v. Cady*, 92 Cal. 83. And if the agents are induced by a fraudulent representation of the principal to accept part payment of their commission in satisfaction of the obligation of the principal, they are entitled to rescind the agreement for satisfaction and recover the full amount of commissions which had previously accrued by reason of a sale effected by the principal without their knowledge: *Dobinson v. McDonald*, 92 Cal. 33.

Where the agency is not exclusive, and the owner reserves the right to sell, he may, without becoming liable for a commission, sell to a customer who has been negotiating with the agent without coming to definite terms, provided such owner acts in good faith and in ignorance of the negotiations with the agent: *Cathcart v. Bacon*, 47 Minn. 34. Compare *Cullen v. Bell*, 43 Minn. 226.

(Whether the loss of a sale, owing to the purchaser's refusal or incapacity to proceed with the bargain, will defeat the right of the agent to recover his

commission will depend upon the terms of the contract of employment. Thus it is held that where the brokers have the sole right to sell the land, and a commission of two per cent on the full amount for which the property is sold is to be paid to them, that commission is earned when they produce a bona fide purchaser on the vendor's terms, even though the sale is not consummated, unless the failure to consummate it, the title proving good, is chargeable to the purchaser: *Smith v. Schiele*, 93 Cal. 144. But under an agreement to pay a commission when the vendees should pay a specified sum on account, and execute their notes and a mortgage for the balance, no commission can be recovered if the purchasers merely executed their notes and mortgage to the vendor, but never pay the required sum, and the vendor is compelled to take back the property: *McPhail v. Buell*, 87 Cal. 115.) As stated above, a failure to make a good title will not, as a rule, defeat the right of the agent to a commission; but where land which had been bonded for sixteen thousand dollars was placed in a broker's hands for sale, with the understanding that the holder of the bond should first make five hundred dollars out of any sale the broker might negotiate, and the broker should have all profit in excess thereof, and a sale was negotiated for eighteen thousand dollars, which the purchaser refused to complete on the ground of defect of title, the broker was held not entitled to a commission: *Seattle L. Co. v. Day*, 2 Wash. 451. Such an agreement would obviously make the right to a commission dependent upon the actual consummation of the sale.

Where the agent's authority is to continue a definite time, he cannot recover his commission unless he procures a purchaser and notifies the principal before the expiration of the period limited: *Wright v. Beach*, 82 Mich. 469. But where the agent, prior to the revocation of his authority, and within the period of employment fixed by the contract, places the transaction in such a position that success is practically certain and immediate, the revocation of his authority and termination of his agency, against the express provisions of the contract of employment, does not deprive him of his right to a commission: *Blumenthal v. Goodall*, 89 Cal. 251. If no limit of time is fixed between the parties, and a negotiation is pending when the agency is revoked, the agent is entitled to commission if the sale is afterwards consummated by the principal: *Knox v. Parker*, 2 Wash. 34. A contract may be indefinite in time as regards one part of its terms, and definite as regards another, and the liability of the principal will be fixed accordingly: *Leelle v. Boyd*, 124 Ind. 320. An agent may recover from two principals whom he brings together, and who make their own bargain uninfluenced by his representations: *Cos v. Hawn*, 127 Ind. 325.

## BERRY v. AMERICAN CENTRAL INSURANCE CO.

[132 NEW YORK, 49.]

**EQUITY—MISTAKE OF LAW—RELIEF ON THE GROUND OF.—AN ASSURED,** induced by the false representations of the insurer, through his agent, as to the law governing the case, to surrender a policy of insurance upon payment of a sum much less than that recoverable thereon, is entitled to relief. So held where an agent of an insurance corporation represented to an assured that his policy was void because he was not the sole and unconditional owner of the property at the time the insurance thereon was affected. The corporation must be presumed to have known

that it was liable for the whole loss, and to have induced the assured to rely upon its supposed superior knowledge of the subject, and this remains true though the agent who made such representation believed it to be a correct statement of the law applicable under the circumstances.

**RESCISSION — TENDER OF DRAFT RECEIVED.** — Where an assured, in compromise of his claim, receives the draft of the insurer, and thereafter seeks to set aside such compromise, and to recover in disregard thereof, it is sufficient for the assured to offer, in his complaint, to surrender such draft, and to follow such offer by producing the draft in court upon the trial, and depositing it with the clerk, to be delivered to the defendant.

**RESCISSION — RESTORATION, OFFER OF.** — In an equitable action to rescind a settlement or compromise, it is sufficient for the plaintiff to offer, in his complaint, to restore what he has received. After such offer, the rights of the parties will be regulated and protected in the final judgment.

**INSURANCE — INTEREST OF ASSURED.** — It is not necessary that the insured have an interest, either legal or equitable, in the property insured. It is enough that he is so situated with reference to it that he would be liable to loss should it be injured by the peril insured against.

**INSURANCE — INTEREST OF ASSURED.** — A TENANT WHO HAS AGREED VERBALLY TO KEEP THE DEMISED PROPERTY INSURED has an insurable interest therein, and insurance effected in his name is valid and enforceable.

**INSURANCE — WAIVER OF CONDITION.** — If a general agent of an insurance corporation, to whom application is made for insurance, is informed that the property belongs to the son of the applicant, and that the latter is to have it as a home during his lifetime, for which he is to have it insured, keep it in repair, and pay taxes, and the corporation thereafter issues a policy of insurance in the name of the applicant, this waives the condition in the policy declaring that it shall be void if, "without notice to this company and permission therefor in writing expressed thereon, the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple," though the policy further provides that no agent has any power to waive any condition therein, and that no notice to, and no consent of or agreement by, any agent of the company shall be binding on it until such notice, consent, or agreement is clearly expressed and indorsed in writing thereon, and signed by such agent.

SUIT to set aside a compromise settlement, and to cancel a release of a policy of insurance on certain property, both real and personal. The real property belonged to plaintiff's son, who had orally agreed that his father might occupy it during his lifetime, in consideration of keeping it insured and in repair, and paying the taxes, and it was claimed that the general agent of the insurance company when the application for insurance was made to him was fully informed of the ownership of the property, and of the circumstances under which plaintiff held possession of it. The policy issued contained the conditions and limitations shown in the last clause of the *syllabus*. After the loss had occurred and proofs thereof

had been made, defendant's adjuster called plaintiff's attention to the conditions of the policy, and told him that by reason thereof the insurer was not liable; and acting upon this information, the plaintiff agreed to accept four hundred dollars in settlement of all his claims. Thereupon a check was given plaintiff, signed by the general agent of the defendant, and directed to it, attached to a blank receipt, and the check provided that it would not be paid if detached from such receipt. The plaintiff, on being informed that the advice given him by the defendant's adjuster was incorrect, offered by letter to return the draft and demanded payment of the loss in full, and such payment having been refused, he brought this action. The trial court gave judgment in plaintiff's favor, and the general term affirmed it on appeal.

*I. N. Ames*, for the appellant.

*Hannibal Smith*, for the respondent.

BROWN, J. There was in this case no misrepresentation as to any fact which was material to the plaintiff's right to recover upon the policy. Indeed, there is no evidence but that the adjuster personally acted in entire good faith, and having no knowledge of the information received by the agents as to the title when the insurance was effected, doubtless believed that the policy was void. But any knowledge or information which any of the defendant's agents received during the transaction with the plaintiff is by law imputed to it; and assuming that the plaintiff, at the time of effecting the insurance, stated correctly the facts as to the title, the statement made by the adjuster that the policy was void, by reason of its conditions and the fact that the plaintiff's son was the owner, was, as emanating from the defendant, fraudulent in law and deceitful.

The court found in substance that the settlement and the cancellation of the policy was procured by the statement made to the plaintiff that the policy was void, and that, relying upon such, plaintiff was led into a mistake as to his legal rights thereunder.

The evidence on the subject was, that the adjuster read to the plaintiff the clause in the policy declaring that it should be void if the interest of the assured was other than that of sole and unconditional ownership, and told him that he was well acquainted with the law of insurance, and because the property belonged to his son, plaintiff had no right to insure

it in his own name, and the policy was, for that reason, void, and nothing could be collected upon it.

The plaintiff was a man of little business experience, although he had education enough to understand the transaction and read the papers which he signed, and he made the settlement voluntarily, without any coercion upon him, but relied upon the representation as to the law governing his case which the defendant falsely made to him.

There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss, and by falsely representing that under the law applicable to the case the policy was void, when in fact it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject, and to surrender to it his claim.

This clearly constituted fraud, and there would be manifest injustice in upholding a settlement under such circumstances. We think the case falls within well-settled rules of equitable jurisdiction, and that the decision of the special term was right: 2 Pomeroy's Eq. Jur., secs. 847-849; Willard's Equity, 68, 69; *Busch v. Busch*, 12 Daley, 476; *Wheeler v. Smith*, 9 How. 55; *Cooke v. Nathan*, 16 Barb. 342; *Boyd v. De La Montagnie*, 73 N. Y. 498; 29 Am. Rep. 197; *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556; *Michigan Mut. L. Ins. Co. v. Bowes*, 42 Mich. 19; *Freeman v. Curtis*, 51 Me. 140; 81 Am. Dec. 564.

The appellant does not, however, question the power of the court to grant relief in such a case, and the only point seriously urged upon us in this connection is, that the plaintiff made no proper or sufficient tender of the draft to the defendant before bringing suit. The plaintiff offered in his complaint to deliver up the draft, and upon the trial produced it in court, and by the decree it was to be deposited with the clerk, and delivered to the defendant or its agent.

It was unnecessary for the plaintiff to do more than he did. In fact, he had received nothing from the defendant. Between parties the note of one of them is not property, but a mere promise to pay, which is avoided by rescission of the contract.

The draft which plaintiff held was drawn upon defendant

by its own agent. It was of no greater force or value than the defendant's note would have been, and in such a case a tender and surrender upon trial was all that was essential to the plaintiff's right to the relief sought: *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Nichols v. Michael*, 23 N. Y. 264; 80 Am. Dec. 259; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75-82.

But in an equity action to rescind a settlement, the rule invoked by defendant has no application. If the plaintiff had failed on the trial the settlement would have stood, and he would have been entitled to retain and use the draft. And it is sufficient in such an action for the plaintiff to offer in his complaint to restore what he has received, and the rights of the parties are then regulated and protected in the judgment: *Allerton v. Allerton*, 50 N. Y. 670; *Vail v. Reynolds*, 118 N. Y. 297-307.

We come, therefore, to the question whether a recovery upon the policy can be upheld. The first contention of the defendant is, that the defendant had no insurable interest in the buildings.

The rule is well settled that it is not necessary to support an insurance that the assured should have an interest, legal or equitable, in the property destroyed. It is enough if he is so situated with reference to it that he would be liable to loss if it is destroyed or injured by the peril insured against.

In brief, a person may insure against his liability with reference to a certain property as well as his interest therein: *Insurance Co. v. Chase*, 5 Wall. 509-513; *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535-541; 60 Am. Rep. 473; 3 Kent's Com., 6th ed., 276.

The test of insurable interest is whether an injury to the property, or its destruction by the peril insured against, would involve the assured in pecuniary loss: Wood on Fire Insurance, sec. 282.

Thus a common carrier may insure goods intrusted to him to their full value, without regard to his liability to the owner: *Crowley v. Cohen*, 3 Barn. & Adol. 478; *London & N. W. R'y Co. v. Glyn*, 1 El. & E. 652.

So may a warehouseman, although liable to the owner only for his own negligence: *Waters v. Monarch F. & L. Ass. Co.*, 5 El. & B. 870; *Stillwell v. Staples*, 19 N. Y. 401; *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84.

So may a charterer of a vessel, who is liable to pay its value

in case of loss, or has contracted to insure it against usual risks: *Oliver v. Greene*, 3 Mass. 133; 3 Am. Dec. 96; *Bartlet v. Walter*, 13 Mass. 267; 7 Am. Dec. 143.

Insurers of a building have an insurable interest therein which they may reinsure: *New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. 359.

And a tenant, who has agreed verbally to keep the demised property insured, is liable to the lessor for a breach of that agreement, and has an insurable interest in the property to the extent of the amount agreed to be insured: *Lawrence v. St. Mark's F. Ins. Co.*, 43 Barb. 479.

Other illustrations of this rule are to be found in *Herkimer v. Rice*, 27 N. Y. 163; *Kline v. Queen's Ins. Co.*, 7 Hun, 267; 69 N. Y. 614; *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606; 6 Am. Rep. 146; May on Insurance, c. 6; 1 Wood on Fire Insurance, c. 8.

The principle upon which these cases all rest is, that there is a possible liability arising out of the peril insured against, and that creates an insurable interest.

Under the contract with his son, the plaintiff had agreed, among other things, to keep the property insured, and this agreement gave him a right to insure the buildings in his own name to their full value. The defendant contends that as the contract with his son was by parol and hence void, the plaintiff had no interest in or liability towards the insured property. This proposition might have some weight if the insurance was upon the title or interest of the plaintiff as life tenant, or if there had been representations on the part of the plaintiff that such was the interest intended to be insured. But we think it has no application to the case made by the evidence. The plaintiff, while in the unquestioned enjoyment and possession of the property, could not deny his liability under the contract with his son to insure, and under that agreement, so far as is disclosed in this action, would have been liable for the loss of the buildings, if he had failed to insure them.

The defendant, if it had notice of the relation which plaintiff bore to the property, cannot deny the legality of its contract, although it may be that the plaintiff could not have enforced against his son his right to use the property for life had that been denied. The final question is, whether the defendant had such notice of the facts as to the title to the property as justified the court in finding that it had waived the conditions heretofore quoted.



The question of waiver was one of fact, and we think the evidence was sufficient to support the conclusion reached.

There was evidence to the effect that plaintiff informed the agent who issued the policy that his son, who lived in Chicago, had bought the property for him, and he was to have it as a home as long as he lived, and that he was to insure it, keep it in repair, and pay the taxes.

This statement fairly gave notice to the agent that the plaintiff was not the owner of the property, and that, as a part of the consideration for its use and possession, he had agreed to insure it.

If the defendant desired further information as to the title, it should have requested it, and not having done so, it must be assumed now to have had notice of such facts as it could with reasonable diligence then have ascertained.

This evidence justified the finding that the conditions of the policy as to title were waived, and this conclusion was not weakened by the fact that in the policy delivered there was a condition that no agent had power to waive any of the conditions of the policy, and no notice to or agreement by any agent would be binding on the defendant unless expressed in writing and indorsed upon the policy and signed by the agent.

The agents who issued the policy were general agents having authority to make contracts without reference to the home office, and their power to waive conditions in the policy was co-existent with that of the company itself: *Trustees v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5-9.

Conditions which enter into the validity of a contract of insurance at its inception may be waived by agents, and are waived if so intended, although they remain in the policy when delivered: *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Bennett v. North British & M. Ins. Co.*, 81 N. Y. 273; 37 Am. Rep. 501; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Haight v. Continental Ins. Co.*, 92 N. Y. 51.

The judgment should be affirmed.

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A BARE MISTAKE OF LAW without more will rarely, if ever, be a ground for relief in equity: *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63, and note. But such relief will always be granted where one party has been unduly influenced or misled by the other: *Jordan v. Stevens*, 51 Me. 78; 81 Am. Dec. 556, and note; or where the opportunities afforded by the mistake are used for the purpose of gaining an unconscionable advantage: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; or where a compromise has been made, for which

there is no other motive than a mistake of plain law; or where the compromise is evidence of fraud, surprise, or imbecility: *Underwood v. Brockman*, 4 Dana, 309; 29 Am. Dec. 407. See also the notes to *Lawrence v. Beaubien*, 23 Am. Dec. 164, 165, and to *Black v. Ward*, 15 Am. Rep. 171.

**KNOWLEDGE OF PRINCIPAL IMPUTED TO AGENT.** — The doctrine that a principal may avail himself of a contract, due to the false representations of an agent who makes those representations believing them to be true, has never been seriously maintained, except in the famous English case of *Cornfoot v. Fovite*, 6 Mees. & W. 358. That decision has never been received as a sound authority, and in fact is generally considered to have been decided on a mere point of pleading. It has been frequently overruled in this country, as in the late case of *Mayer v. Dean*, 115 N. Y. 556.

**HE WHO SEEKS EQUITY MUST DO EQUITY:** *Yard v. Pacific Mutual Ins. Co.*, 10 N. J. Eq. 480; 64 Am. Dec. 487. Thus a vendor cannot rescind his contract of conveyance and at the same time hold on to what he has received: *Westhafer v. Patterson*, 120 Ind. 459; 16 Am. St. Rep. 330; *Hammond v. Wallace*, 85 Cal. 522; 20 Am. St. Rep. 239; *Phillips v. Herndon*, 78 Tex. 378; 22 Am. St. Rep. 59; *Drew v. Pellar*, 87 Cal. 443; 22 Am. St. Rep. 257. So, also, a party rescinding a contract for fraud must return what he has received on it, or offer to do so: *Masson v. Bovee*, 1 Denio, 69; 43 Am. Dec. 651.

**INSURABLE INTEREST.** — See generally extended note to *Strong v. Ins. Co.*, 20 Am. Dec. 510-518. Such interest exists wherever a legal connection can be shown to exist between injury to the thing insured and the loss to the party insuring: *McDonald v. Black*, 20 Ohio, 185; 55 Am. Dec. 448. In *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686, it was held that the purchaser of lands under articles of agreement, though the purchase-money is unpaid, has an insurable interest in buildings on the land, within the contemplation of a policy containing a condition that it should be void "if the interest of the assured should be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple."

**WAIVER OF CONDITIONS BY AGENT OF INSURANCE COMPANY:** See note to *Wheaton v. Ins. Co.*, 9 Am. St. Rep. 234-236. As to oral waiver, see notes to *Phoenix Ins. Co. v. Bowdre*, 19 Am. St. Rep. 333; and to *McFarland v. Ins. Co.*, 19 Am. St. Rep. 726. An insurance agent authorized to take risks and issue policies has authority to waive by parol a condition in a policy issued by him: *Grubbs v. N. Car. Home Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62. An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot, by its agents, make an oral contract or an oral waiver, not forbidden by the statute of frauds: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.

## ALLAN v. STATE STEAMSHIP COMPANY.

(182 NEW YORK, 91.)

**EVIDENCE — BURDEN OF PROOF.** — **THE LIABILITY OF DRUGGISTS** is the same as that governing the liability of professional persons whose work requires special knowledge or skill, and such a person is not legally responsible for an unintentional consequential injury resulting from a lawful act, when the failure to exercise proper care cannot be imputed to him, and the burden of proving such lack of care, when the act is lawful, is upon the plaintiff.

**SHIPPING — LIABILITY OF CARRIER OF PASSENGERS FOR NEGLIGENCE OF PHYSICIAN.** — If a physician of a passenger ship, being applied to for a drug by a passenger, furnishes another, which is taken by him in ignorance of the mistake and to his injury, the owners of the ship are not answerable in damages, where they have in every respect complied with the statute requiring them to carry a duly qualified medical practitioner, and to provide for the use of passengers a supply of medicines, which medicines shall, in the judgment of the emigration officer of the port of clearance, be of good quality and properly packed, and placed in the charge of a medical practitioner, and the medical practitioner is, as the statute requires, authorized by law to practice, and his name has been notified to such emigration officer and has not been objected to. When the ship-owners complied with the statute, they had no further duty to perform, and they, therefore, cannot be held answerable for the negligence of the medical practitioner.

**SHIP-OWNER IS NOT LIABLE FOR CONFUSION IN THE "SURGERY," OR DISORDER IN THE ARRANGEMENT OF MEDICINES**, if they were in proper order when placed in charge of the physician. No officer of the ship is competent to supervise the physician, and hence the ship-owners cannot be deemed negligent in not supervising him. The physician is not the shipowner's servant, doing his work and subject to his direction, and therefore such owner is not liable for the act or neglect of the physician.

**ACTION** to recover damages for injury suffered by the plaintiff while a passenger on the steamer *State of Georgia*, on a voyage from Glasgow to New York, from the ship's physician giving him calomel when he called for quinine. Judgment in favor of the plaintiff was affirmed, and a new trial denied by the general term.

*William D. Guthrie*, for the appellant.

*M. L. Towns*, for the respondent.

**BROWN, J.** The learned counsel for the respondent contends that when the plaintiff applied for quinine she had a right to rely upon receiving that medicine, and if she was given anything else the defendant was liable for the injuries sustained, and that mistake upon the part of the physician having charge of the ship's medicines was not a defense.

*Van Wyck v. Allen*, 69 N. Y. 62, 25 Am. Rep. 136, and *Thomas*

v. *Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, are the authorities cited in support of that proposition.

The first case was an action upon contract for breach of an implied warranty. The main question there decided related to the rule of damages. The case has no application to an action for a wrong which has its foundation in the violation of a duty entirely outside of and beyond the stipulations of the contract. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, was decided upon the negligence of the defendant. The trial court charged the jury that "if the defendant was guilty of negligence in putting up and vending the extracts in question, the plaintiff was entitled to recover," and this court held that the liability of the defendant did not arise out of any contract or direct privity between him and the plaintiff, but out of the duty imposed upon him to avoid acts in their nature dangerous to the lives of others. And in carelessly labeling a deadly poison as a harmless medicine and sending it so labeled into the market, the court found the negligence upon which a recovery was sustained.

But whether the druggist, who made the immediate sale of the poison to the plaintiff, would have been liable to her, or whether he was justified in selling the article upon the faith of the defendant's label, was not in that case decided.

That precise question was decided, however, in *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, and in *Beckwith v. Oatman*, 43 Hun, 265.

In both of these cases a recovery was permitted by the trial courts upon proof of the fact of a sale of poison to a person who called for a harmless drug, and the question of negligence was withdrawn from the consideration of the jury, over the defendant's objection and exception.

In both cases the exception was sustained, the appellate courts holding that a failure on the part of the druggist or his clerk to exercise due care and skill must be proved.

We quote with approval from the opinion of Judge Cooley in the Michigan case: "The question is, whether the delivery at a drug-store of a deleterious drug to one who calls for one that is harmless, and a damage resulting therefrom, will not merely tend to make out a right of action, but of themselves give a right of action, even though there may have been no intentional wrong, and the jury may believe there was no negligence. That such an error might occur without fault on the part of the druggist or his clerks is readily supposable. He may

have bought his drugs from a reputable dealer, in whose warehouse they have been tampered with for the purposes of mischief. It is easy to suggest accidents after they come to his own possession, or wrongs by others, of which he would be ignorant, and against which a high degree of care would not give perfect protection. But how misfortune occurs is unimportant if, under all circumstances, the fact of occurrence is attributable to him as legal fault. The case, it must be conceded, is one in which a very high degree of care may justly be required. . . . It is therefore proper and reasonable that the care required shall be proportioned to the danger involved. But we do not find that the authorities have gone so far as to dispense with actual negligence as a necessary element in the liability when a mistake has occurred."

No case is cited which conflicts with the rule thus stated, and I think no authority to the contrary exists in this state.

The rule of liability applicable to a druggist in cases of this character is the same as that which governs the liability of professional persons whose work requires special knowledge or skill, and a person is not legally responsible for any unintentional consequential injury resulting from a lawful act when the failure to exercise due and proper care cannot be imputed to him, and the burden of proving such lack of care, when the act is lawful, is upon the plaintiff: *Brown v. Marshall*, 47 Mich. 576; 41 Am. Rep. 728; *Thomas v. Winchester*, 6 N. Y. 397; 57 Am. Dec. 455; *Beckwith v. Oatman*, 43 Hun, 265; *Losce v. Buchanan*, 51 N. Y. 476-488; 10 Am. Rep. 623; *Carpenter v. Blake*, 75 N. Y. 12; *Morris v. Platt*, 32 Conn. 75; *Simonds v. Henry*, 39 Me. 155; 63 Am. Dec. 611; *Fleet v. Hollenkemp*, 13 B. Mon. 219; 56 Am. Dec. 563.

Negligence of the defendant, therefore, being the foundation of the plaintiff's cause of action, we proceed to the consideration of the facts of the case.

The defendant was a common carrier of passengers, and we need not discuss whether the common law imposed upon it any duty to treat those who were sick, nor whether it made it responsible for their proper care or management.

The duty that it assumed in this respect in this case was imposed upon it by the statute of Great Britain under the laws of which it was incorporated.

That statute, known and cited as "The Passengers' Act, 1855," and entitled "An act to amend the law relating to the carriage of passengers by sea," passed August 14, 1855, enacts:—

1. That "every passenger ship shall . . . carry a duly qualified medical practitioner, who shall be rated on the ship's articles": Sec. 41.

2. "The owner or charterer of every passenger ship shall provide for the use of the passengers a supply of medicine . . . proper and necessary for diseases . . . incident to sea voyages, and for the medical treatment of the passengers during the voyage; and such medicines . . . shall, in the judgment of the emigration officer at the port of clearance, be good in quality and sufficient in quantity for the probable exigencies of the intended voyage, and shall be properly packed and placed under the charge of the medical practitioner, . . . to be used at his discretion": Sec. 43.

3. "No passenger ship . . . shall clear out or proceed to sea until some medical practitioner, to be appointed by the emigration officer at the port of clearance, shall have inspected such medicines . . . as are required to be supplied by the last section, . . . and shall have certified to the said emigration officer that the said ship contains a sufficient supply, etc.": Sec. 44.

And by section 42 it was further provided that "no medical practitioner should be considered to be duly qualified for the purposes of this act unless authorized by law to practice in some part of her majesty's dominions as a physician, surgeon, or apothecary, nor unless his name shall have been notified to the emigration officer at the port of clearance, and shall not be objected to by him."

It was alleged and proved that the defendant, for the purpose of advertising its line, issued a prospectus which contained the following statement: "An experienced surgeon is carried on board every ship. . . . All medicines, medical comforts, and attendance required are supplied gratis."

This prospectus, it will be observed, went no further in its representation than the requirements of the statute. A medical practitioner duly qualified as required by the provisions of the act quoted may fairly be assumed to be referred to, and the fact that no charge was made for medicines neither added to nor qualified the duty resting upon the defendant under the law. The defendant's liability must be sought for in its failure to perform the duty imposed upon it by the statute.

Beyond that it had assumed none and had none to perform, and consequently violated none owing to its passengers. If the things which the statute required it to do were performed

with due and proper care, its duty to the passengers was discharged.

The obligations imposed by the statute were twofold: 1. To employ a duly qualified physician; and 2. To provide a supply of medicines, properly packed and labeled, and suitable and necessary for disease incident to sea voyages. When these two things had been done, and the certificate of their performance given by the government officers, the ship was permitted to proceed upon its voyage, and the medicines were from that time under the charge of the physician, to be used at his discretion. No negligence is claimed to exist in the performance of either of these duties. No evidence was offered that the supply of medicine was insufficient in quantity or quality, and the respondent's counsel concedes that the competency of the physician was established, and the court charged the jury that for his negligence the defendant was not responsible.

The plaintiff, however, gave evidence by a passenger that he applied to the physician for medicine on the same evening that the plaintiff did, and that he found the "surgery," where the medicines were kept, in disorder and confusion; that some of the bottles were in the racks and others on the racks, and looked as if they were out of place; and it was by the trial court left to the jury to determine whether the "surgery" was in such a condition of confusion as to show that the company did not use ordinary care in providing medicines and properly labeling them, or left them open so that a mistake was very liable to occur.

As already stated, there was no evidence of a failure to provide an adequate and proper quantity of medicine of good quality, and none that they were not properly packed and labeled, or that the "surgery" was not properly fitted up, or that it was an improper place for the purposes designated.

All the evidence on that subject came from the defendant, and was to the effect that all that the statute required was done, and that the government officers certified to its performance. The negligence charged, therefore, rests in the confusion in the "surgery," and the disarrangement of the bottles. It was affirmatively shown by defendant that between Glasgow and Greenock, during the first two hours of the voyage, the medicines were inspected by the medical examiner of the port of Glasgow, with the assistance of the physician, and that they were then properly packed and labeled, and placed in the

**racks.** The statute required that they should then be placed under the charge of the physician, and be used at his discretion.

The medical examiner of the port left the vessel about six o'clock on the evening of the first day of the voyage, and the plaintiff applied for medicine about eight o'clock in the evening of the following day, and the question presented, therefore, is, whether the testimony of confusion in the "surgery," or disorder in the arrangement of the medicine, existing after the vessel put to sea, and after the medicines were placed in charge of the physician, was evidence of such neglect of duty on the part of defendant as to render it liable for such injuries as the plaintiff sustained. We think it was not. Any other construction must assume that the ship-owner is bound to exercise some supervision over the physician in his treatment of the passengers and his arrangement of the medicine. But no officer on the ship is competent to do that. The very object of the statute is, that a skilled professional man shall be on board the ship to attend the passengers in case of sea-sickness, and dispense the drugs and medicines. Can we hold that a sailor shall have supervision over the doctor, or that an unskilled man, with no ability to tell one drug from another, shall have authority over the skilled experienced physician? To so hold would nullify the law, and put inexperience over experience, and ignorance where the law requires knowledge and professional skill.

When the ship-owner has employed a competent physician duly qualified as required by the law, and has placed in his charge a supply of medicines sufficient in quantity and quality for the purposes required, which meet the approval of the government officials, and has furnished to the physician a proper place in which to keep them, we think it has performed its duty to its passengers; that from that time the responsible person is the physician, and errors and mistakes occurring in the use of the medicines are not chargeable to the ship-owner; and that no different rule is applicable to such mistakes as are the result of improper arrangement in the care of the medicines than to those which are the result of errors in judgment.

The work which the physician does after the vessel starts on the voyage is his, and not the ship-owner's.

It is optional entirely with the passengers whether or not they employ the physician. They may use his medicines or



not as they choose. They may place themselves under his care or go without attendance, as they prefer, and they determine themselves how far and to what extent they will submit to his control and treatment. The captain of the ship cannot interfere. The physician is not the ship-owner's servant, doing his work, and subject to his direction. In his department, in the care and attendance of the sick passengers, he is independent of all superior authority except that of his patient, and the captain of the ship has no power to interfere except at the passenger's request. These views find support in *Laubheim v. De Koninglyke N. S. Co.*, 107 N. Y. 229, 1 Am. St. Rep. 815, and in *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272.

The first case arose before Congress had legislated upon the subject, but it was said in the opinion that "if by law or by choice the defendant was bound to provide a surgeon for its ship, its duty to the passengers was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty." The Massachusetts case was decided upon a statute of the United States similar to that of Great Britain, and it was there said that the ship-owners "do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicine, and medical comforts, and have him in readiness for such passengers as choose to employ him."

We think that is the extent of the requirement of the statute in this case, and if there was any common-law liability resting upon the defendant to make provision for the care and attendance of its passengers when sick, it was no greater than that imposed by the statute.

These views lead to the conclusion that the evidence failed to show the neglect of any duty which the defendant owed to the plaintiff, and the motion to dismiss the complaint should have been granted.

The judgment should be reversed and a new trial granted.

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DEGREE OF SKILL AND CARE REQUIRED of surgeon is that reasonable degree of care and skill which physicians and surgeons ordinarily use, and if such want of skill is alleged, it must be proved by the party alleging it: *State v. Housekeeper*, 70 Md. 162; 14 Am. St. Rep. 340, and note. See also *Holtzman v. Hoy*, 59 Am. Rep. 392-394, and note.

BURDEN OF PROOF OF NEGLIGENCE lies on the party suing to recover damages: *Birmingham etc. R'y Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748, and note. See also note to *Huey v. Gahlenbeck*, 6 Am. St. Rep. 792.

WHERE THE LAW COMPELS THE EMPLOYMENT of a person in a particular matter, the employer is not liable for such person's acts: *James v. San Francisco*, 6 Cal. 528; 65 Am. Dec. 528. Compare the rule that, where the law compels the employment of a pilot, the ship-owners will not be liable for injuries resulting from his negligence: See the English cases of *The Agricola*, 2 W. Rob. 10, and *The Halley*, L. R. 2 P. O. 193.

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## DWIGHT v. ELMIRA, CORTLAND, AND NORTHERN RAILROAD COMPANY.

[182 NEW YORK, 190.]

**DAMAGES RESULTING FROM THE DESTRUCTION OF FRUIT-TREES** by fire, where their owner is not satisfied to accept their value after separated from the realty, are to be ascertained by deducting the value of the land after the fire from the value of the land before the fire. Therefore, it is error to permit a witness, against objection, to answer the question, "What were those trees worth before they were killed?"

**DAMAGES. — VALUE OF FRUIT-TREES** cannot be accurately measured without reference to the soil on which they stand, and therefore, when damages are sought to be recovered for their destruction, the question is not, what were they worth disconnected from the soil, but, how much has the value of the realty been depreciated by such destruction.

**DAMAGES. — WHEN FOREST TREES** grown to maturity, or nursery trees in, tended for marketing, are cut down or otherwise destroyed, the measure of damages is their value separated from the soil, but even in the case of full-grown trees, their owner may recover damages to his land, consisting of the difference in value of the land before and after their cutting or other destruction.

**ACTION** to recover for damages for negligence resulting in the loss of trees by fire. Judgment in favor of plaintiff.

*James Armstrong*, for the appellant.

*Raymond L. Smith*, for the respondent.

**PARKER, J.** The judgment awards to the plaintiff five hundred and three dollars for damages occasioned by the defendant's negligence in setting on fire and destroying twenty-one apple-trees, two cherry-trees, and two and one half tons of standing grass, and also injuring seven apple-trees, the property of plaintiff.

The only question presented on this appeal is, whether the proper measure of damages was adopted on the trial.

A witness called by the plaintiff was asked: Q. What were those twenty-one trees worth at the time they were killed? Objection was made that the evidence did not tend to prove

the proper measure of damages, but the objection was overruled, and the answer was: A. "I should say they were worth fifty dollars apiece." Similar questions were propounded as to the other trees; a like objection interposed; the same ruling made; answers to the same effect, except as to value, given; and appropriate exceptions taken.

Testimony was also given tending to prove that the land burned over by the fire was depreciated in value thirty dollars per acre.

The only evidence offered by the plaintiff touching the question of damages was of the character already alluded to.

Fruit-trees like those which are the subject of this controversy have little if any value after being detached from the soil, as the wood cannot be made use of for any practical purpose, but while connected with the land they have a producing capacity, which adds to the value of the realty.

Necessarily the testimony adduced tended to show, not the value of the trees severed from the freehold, but their value as bearing trees, connected with and depending on the soil for the nourishment essential to the growth of fruit.

How much was the realty, of which the trees formed a part, damaged, was the result aimed at by the questions, and attempted to be secured by the answers.

Can the owner of an injured freehold, because the trees taken or destroyed happen to be fruit instead of timber trees, have his damages measured in that manner, is the question presented now for the first time in this court, so far as we have observed.

The learned referee followed the decision in *Whitbeck v. New York C. R. R. Co.*, 36 Barb. 644, in which the proposition is asserted, that while fruit-trees form a part of the land, the true rule is, that if the thing destroyed has a value which can be accurately measured without reference to the value of the soil in which it stands or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction. The court cited no authority for the conclusion reached, and our attention has not been called to any prior decision justifying its position. Nor has the *Whitbeck* case been approved in this court, although cited and distinguished in *Argotsinger v. Vines*, 82 N. Y. 309.

While the rule is undoubtedly as stated by the learned judge in the *Whitbeck* case, that a recovery may be had for

the value of the thing destroyed, where it has a value which may be accurately measured without reference to the soil in which it stands, he apparently overlooked the fact that fruit-trees do not have such a value, and the rule was, therefore, as we think, wrongly applied.

Cases are not wanting to illustrate a proper application of that rule. Where timber, forming part of a forest, is fully grown, the value of the trees taken or destroyed can be recovered.

In nearly all jurisdictions this is all that may be recovered, and the reason assigned for it is, that the realty has not been damaged, because the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses: 3 Sutherland on Damages, 374; 3 Sedgwick on Damages, 8th ed., 45; *Single v. Schneider*, 30 Wis. 570; *Webster v. Moe*, 35 Wis. 75; *Webber v. Quaw*, 46 Wis. 118; *Haseltine v. Mosher*, 51 Wis. 443; *Tuttle v. Wilson*, 52 Wis. 643; *Wooden-ware Co. v. United States*, 106 U. S. 432; *Graessle v. Carpenter*, 70 Iowa, 166; *Ward v. Carson Riv. W. Co.*, 13 Nev. 44; *Tilden v. Johnson*, 52 Vt. 628; 36 Am. Rep. 769; *Adams v. Blodgett*, 47 N. H. 219; *Cushing v. Longfellow*, 26 Me. 306.

In this state it is settled that even where full-grown timber is cut or destroyed, the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting or destruction complained of: *Argotsinger v. Vines*, 82 N. Y. 308; *Van Deusen v. Young*, 29 N. Y. 36; *Easterbrook v. Erie R. R. Co.*, 51 Barb. 94.

The rule is also applicable to nursery trees grown for market, because they have a value for transplanting; the soil is not damaged by their removal, and their market value necessarily furnishes the true rule of damages: 3 Sedgwick on Damages, 8th ed., 48; *Birket v. Williams*, 30 Ill. App. 451.

Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages where it has a value after removal, and the land has sustained no injury because of it: 3 Sedgwick on Damages, 8th ed., 48; 3 Sutherland on Damages, 374; 5 Am. & Eng. Ency. of Law. 36, note 2; *Stockbridge Iron Co. v. Cons Iron Works*, 102 Mass. 80; *Oak Ridge Coal Co. v. Rogers*, 108 Pa. St. 147-152; *Dougherty v. Chesnutt*, 88 Tenn. 1; *Coleman's Appeal*, 62 Pa. St. 252; *Ross v. Scott*, 15

Lea, 479-488; *Forsyth v. Wells*, 41 Pa. St. 291; 80 Am. Dec. 617; *Chamberlain v. Collinson*, 45 Iowa, 429; *Morgan v. Powell*, 3 Adol. & E. N. R. 278; *Martin v. Porter*, 5 Mees. & W. 351.

On the other hand, cases are not wanting where the value of the thing detached from the soil would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land.

This is the rule where growing timber is cut or destroyed. Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damage, therefore, necessarily extends beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled: *Longfellow v. Quimby*, 33 Me. 457; *Chipman v. Hibberd*, 6 Cal. 162; *Wallace v. Goodall*, 18 N. H. 439-456; *Hayes v. Chicago etc. R'y Co.*, 45 Minn. 17-20.

In Wallace's case the court said: "The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land stripped of its trees may be valueless. The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated, unless he could receive a sum that would be equal to their value to him while standing upon the soil."

The same rule prevails as to shade-trees, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock: *Nixon v. Stillwell*, 52 Hun, 353, and cases cited *supra*.

The current of authority is to the effect that fruit-trees and ornamental or growing trees are subject to the same rule: *Montgomery v. Locks*, 72 Cal. 75; *Mitchell v. Billingsley*, 17 Ala. 391-393; *Wallace v. Goodall*, 18 N. H. 439-456; 3 Sedgwick on Damages, 8th ed., sec. 933.

It is apparent from the authorities already cited, as well as those following, that in cases of injury to real estate the courts recognize two elements of damage: 1. The value of the tree or other thing taken, after separation from the freehold, if it have any; 2. The damage to the realty, if any, occasioned by the removal: *Ensley v. Mayor etc.*, 2 Baxt. 144; *Striegel v. Moore*, 55 Iowa, 88; *Longfellow v. Quimby*, 33 Me. 457; *Foots v. Merrill*, 54 N. H. 490; 20 Am. Rep. 151.

A party may be content to accept the market value of the thing taken, when he is also entitled to recover for the injury done to the freehold. But if he asserts his right to go beyond the value of the thing taken, or destroyed after severance from the freehold, so as to secure compensation for the damage done to his land because of it, then the measure of damages is the difference in value of the land before and after the injury.

In this case the plaintiff was not satisfied with a recovery based on the value of the trees destroyed after separation from the realty of which they formed a part, as indeed he should not have been, as such value was little or nothing, so he sought to obtain the loss occasioned to the land by reason of the destruction of an orchard of fruit-bearing trees, which added largely to its productive value.

This was his right, but the measure of damages in such a case is, as we have observed, the difference in value of the land before and after the injury, and as this rule was not followed but rejected on the trial, and a method of proving damages adopted not recognized nor permitted by the courts, the judgment should be reversed.

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**THE MEASURE OF DAMAGES FOR CUTTING DOWN AND CARRYING AWAY TREES** is the amount of injury which the plaintiff suffered from the whole trespass, taken as a continuous act: *Railway Co. v. Hutchins*, 32 Ohio St. 571; 30 Am. Rep. 629; *Tilden v. Johnson*, 52 Vt. 628; 36 Am. Rep. 769. Measure of damages for destruction or loss of growing crops is, in general, the value of the crops standing on the ground, and not the loss as measured by the rental value of the land: *Byrne v. Minneapolis R'y Co.*, 38 Minn. 212; 8 Am. St. Rep. 668, and note.

**MEASURE OF DAMAGES FOR MINING COAL ON ANOTHER'S LAND.** — See, in addition to the cases cited in the opinion of the principal case, *Coal Creek Mining Co. v. Moses*, 15 Lea, 300; 54 Am. Rep. 415; *Barton Coal Co. v. Con,* 39 Md. 1; 17 Am. Rep. 525; *Blaen Avon Coal Co. v. McCulloh*, 59 Md. 403; 43 Am. Rep. 560; *Franklin Coal Co. v. McMillan*, 49 Md. 549; 33 Am. Rep. 280; *McLean County Coal Co. v. Lennon*, 91 Ill. 561; 33 Am. Rep. 64; *Illinois etc. R. R. Co. v. Ogle*, 82 Ill. 637; 25 Am. Rep. 342; *Waters v. Stevenson*, 15 Nev. 157; 29 Am. Rep. 293; *Austin v. Huntsville etc. Mining Co.*, 72 Mo. 535; 37 Am. Rep. 446.

**BRISTOL v. EQUITABLE LIFE ASSURANCE SOCIETY.**

[182 NEW YORK, 264.]

**SYSTEM OF BUSINESS — PROPERTY IN.** — One who communicates to an insurance corporation a new system of soliciting insurance, in a letter requesting employment, cannot, on the corporation's adopting and using the system without giving him employment, sustain an action for an accounting, or to recover compensation for its continuing to use the system notwithstanding his protests.

**ACTION** for an accounting, and to recover compensation for communicating to defendant a new system of soliciting life insurance. The communication was made in a letter soliciting employment. The employment was not given, but the system was adopted and used, notwithstanding plaintiff's protest, and it was alleged that a large amount of business was obtained thereby. A demurrer to the complaint was sustained in the lower court, and this decision was affirmed on appeal to the general term.

*Raphael J. Moses*, for the appellant.

*Charles B. Alexander*, for the respondent.

**LONDON, J.** Assuming, without deciding, that if the defendant has wrongfully appropriated or converted to its own use the plaintiff's property, or infringed upon his property rights or privileges, and has, without right, made use of them, it ought to respond to the plaintiff for such use, and should render an account to him respecting the same, the question arises upon this complaint whether the subject of the appropriation and use constituted property or property rights of the plaintiff.

The plaintiff does not allege that he was the exclusive possessor of the system. His letter to the defendant instances several companies which have used it to advantage, and states that "underlying the whole system is a common-sense plan of advertising." Its use seems to be its disclosure. He does not complain of the use that the defendant has made of it, but seeks to recover for it as if defendant had used his property. His case is unlike those in which the injunctive process of the court is sought to restrain the disclosure of a secret or the publication of a letter, which may prove injurious to business or character.

Nor is his case like that of one who writes a tale or treatise or play, or composes a piece of music, or paints a picture, or makes an invention; in such cases there is a production which

can, by multiplying copies, be put to marketable use, and its exclusive ownership be easily preserved and protected. Whoever infringes takes benefits or profits which otherwise would naturally come to the producer. Here the defendant has taken from the plaintiff no profits nor diverted them from him.

Without denying that there may be property in an idea, or trade secret or system, it is obvious that its originator or proprietor must himself protect it from escape or disclosure. If it cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas, and become the acquisition of whoever receives it: *Peabody v. Norfolk*, 98 Mass. 452; 96 Am. Dec. 664.

The allegation of the complaint that the defendant disclosed the system in confidence to the defendant is vague. It does not necessarily mean that the defendant agreed not to use it; it may mean something else. Defendant is at liberty to conduct its business in its own way; it obtained a valuable hint from the plaintiff and assumed no legal obligation to pay the plaintiff if it should conclude to act upon it.

Plaintiff communicated his system without marketing it. It was valuable to the defendant. But what has plaintiff lost thereby? He alleges nothing more than the loss of the sale to a single party who refused to buy. The system, we may assume, was valuable to those who had insurance to sell. Plaintiff does not allege that he had any to sell. He does not allege that his system was marketable, or might have been made so but for the use made of it by defendant.

A wishes to sell his house and lot. B tells him in confidence that C desires to buy it, and B solicits employment to negotiate the sale. A declines, but acting upon B's communication meets C, and himself negotiates and closes the contract of sale. B has no cause of action against A. He had information which he hoped to market, but he parted with it without finding any market.

The plaintiff himself communicated his system to the defendant to induce it to employ him, and thus used it as an attractive adjunct to his own self-commendation or in corroboration of it. He could not induce the defendant to "adopt this system and the writer with it." Yet as the defendant acted upon the hint the plaintiff gave to it, and found it profit-



able to do so, the plaintiff asks the defendant to pay him a percentage of its profits.

We do not think the complaint states a cause of action.  
Judgment should be affirmed.

**INVENTORY OF TRADE SECRET, HOW FAR PROTECTED IN EQUITY:** See note to *Peabody v. Norfolk*, 96 Am. Dec. 669, 670.

**INVENTOR OR AUTHOR** has, independent of letters patent or of copyright, an exclusive property in his invention, until by publication it becomes the property of the general public: *Tabor v. Hoffmann*, 118 N. Y. 30; 16 Am. St. Rep. 740. Such an invention may be transferred by oral agreement: *Jones v. Reynolds*, 120 N. Y. 213.

**SPONTANEOUS AND UNASKED SERVICE** will not support *assumpsit*: *Woodes v. Ayres*, 39 Mich. 345; 33 Am. Rep. 396.

## BORK v. MARTIN.

[182 NEW YORK, 280.]

**TRUST CREATED BY PAROL.** — If land is conveyed to one under a parol trust invalid by the statute of frauds, the terms of which were that he should hold such land and sell it and pay the proceeds to a particular person, and he in fact accepts the conveyance and sells the land and thus executes such trust, he will not be permitted to retain the proceeds, but may be compelled to pay them as he agreed to do.

**STATUTE OF FRAUDS WILL NOT BE ALLOWED TO BE USED AS AN INSTRUMENT OF FRAUD** if a court can prevent it.

**PLEADING — ACTION TO ENFORCE TRUST.** — When the facts alleged show that plaintiff is entitled to certain moneys from defendant under a trust, but the complaint also states that the defendant "has fraudulently and dishonestly appropriated the said moneys and converted them to his own use," this latter allegation does not convert the action into one of trover.

**ACTION** by George Bork against Alexander Martin to recover moneys realized from the sale of lots. These lots, in September, 1883, were held by Henry Box under a deed absolute in form, but in fact given by Joseph Bork, the owner of the property, to secure the payment of four thousand dollars due to Box. Joseph then agreed with George to assume the payment of this indebtedness, in consideration of which, and for other reasons, the latter was to be entitled to the property. It was agreed between plaintiff and defendant that the latter should hold the lands for the use and benefit of plaintiff, and should sell them as directed by plaintiff, and should pay him the proceeds of all sales. In pursuance of this agreement, plaintiff paid off the indebtedness and caused Box to convey

the lands to defendant. Plaintiff negotiated various sales of lots, and defendant made conveyances pursuant thereto, paying the proceeds to the plaintiff until all but five were sold. When those five had also been sold, defendant refused to execute any conveyance thereof until he had received payment of the purchase price. Plaintiff, to secure deeds for the purchasers, advanced the necessary moneys, amounting to \$1,980, and paid them to defendant's wife upon his direction. Defendant thereupon executed deeds to the purchasers, and the plaintiff brought this action to recover the purchase price. Judgment in favor of the plaintiff in the trial court was affirmed by the general term.

*Adelbert Moot*, for the appellant.

*David F. Day*, for the respondent.

LANDON, J. Joseph Bork, originally having an equity in the premises, and being indebted to Box for about four thousand dollars, requested Box to take the legal title as security for the debt, and also to protect Joseph's equity. Box consented, and although the deed to himself was absolute, he treated it as a mortgage from Joseph, and in equity it was a mortgage: *Carr v. Carr*, 52 N. Y. 251. Afterwards, Joseph and his brother, the plaintiff, agreed that the plaintiff should pay Box the mortgage debt, and for that and other considerations, plaintiff should have Joseph's equity in the land. Box consented. To accomplish this, Box conveyed the land upon Joseph's and the plaintiff's request to the defendant, who, paying no consideration, orally agreed to hold the title for plaintiff's convenience and benefit. The plaintiff paid Box the mortgage debt. The premises consisted of twenty-five building lots. Defendant agreed to convey the same, upon plaintiff's request, to such purchasers as the plaintiff should procure, and to pay the purchase-money as received to the plaintiff.

The agreement was fully performed by the defendant, except that after conveying, pursuant to plaintiff's request, twenty of the lots and paying him the purchase-money received, or allowing him to receive it himself, and finally conveying the last five lots pursuant to the like request and receiving the purchase-money, the defendant then refused to pay it to plaintiff.

Thus the present controversy is not in respect of the land,

for that has been properly disposed of, but in respect of the purchase-money received by the defendant for the last five lots sold.

Assuming that the land was conveyed to the defendant upon an oral trust, invalid under the statutes of frauds and of uses and trusts (2 Rev. Stats. 134, sec. 6; 1 Rev. Stats. 728, sec. 51), yet it was lawful for him to perform it, and he has fully performed it so far as it required him to dispose of the land. The land is all sold, and he has the price of the last five lots in his pocket. The language of the cases is to the effect that he cannot, in good conscience, retain it, and that it belongs to the plaintiff: *Robbins v. Robbins*, 89 N. Y. 258; *Dunn v. Hornbeck*, 72 N. Y. 80; *Foote v. Bryant*, 47 N. Y. 544.

Though the statutes might have justified the defendant's refusal to dispose of the land as he had orally agreed, yet, having disposed of it, he has voluntarily emerged from the field of their protection, and exposed himself to the law, which deals with him as a trustee of personal property realized for plaintiff's benefit, by virtue of an agency for the plaintiff, which he has so far performed, pursuant to the plaintiff's instructions and his own agreement, as to obtain the moneys his agency was constituted to produce. Equity approves his performance, so far as he has performed, and as the statutes referred to no longer apply, there is no law which he can invoke to shield him from the full performance of his duty.

The court will not allow the statute of frauds to be used as an instrument of fraud, if it can prevent it: *Cases supra*; *Ryan v. Dox*, 34 N. Y. 307; 90 Am. Dec. 696; *Levy v. Brush*, 45 N. Y. 596; *Siemon v. Schenk*, 29 N. Y. 598.

Here the defendant co-operated with the plaintiff for years in the execution of the agreement entered into for plaintiff's benefit, plaintiff while performing the active labor of negotiating the sale of the lots in full reliance upon defendant's fidelity. In the end, when the fruits of the enterprise have come to defendant's hands ready for delivery to the plaintiff, the defendant halts in his fidelity, and seeks to appropriate to himself what he agreed to deliver to the plaintiff. He thus seeks to perpetrate a fraud. It is the duty of the court to prevent it.

When the defendant says that it is not fraudulent to refuse to perform a contract which the statute declares to be void, the answer is, that he is not charged with a refusal to perform that part of the contract; he has voluntarily performed it. A

trust in the money may be established by parol: *Day v. Roth*, 18 N. Y. 448; *Robbins v. Robbins*, 89 N. Y. 258. So, too, when the defendant says this money is the proceeds of the sale of his own land, the reply is, that the money is the proceeds of the land which plaintiff intrusted to the defendant to sell for his benefit; that the defendant cannot, with the avails of his agency in his pocket, dispute his agency, or his principal's power to appoint him: *Supervisors of Rensselaer Co. v. Bates*, 17 N. Y. 242; that the statutes relate to land, not to money; that since the defendant has waived his statutory protection and converted the land into money, the court will accept both his waiver and performance so far as he has accomplished them, and take up his agency at the point where he has repudiated it; and since it would be unjust to threat the money as land, and thus allow the defendant to recede from his honest performance, the court will not permit it.

The same equitable considerations defeat the application of the statute, which declares that where the grant is to one person and the consideration paid by another, no trust results in favor of the latter. The plaintiff seeks to establish no resulting trust in the land. The voluntary performance of the defendant has carried the case beyond that stage, and the trust is in the money which the facts show the defendant received for plaintiff's benefit. It is simply a question whether the defendant can, *ex æquo et bono*, refuse to pay it to plaintiff. The defendant's argument is, that if the plaintiff had no equity or estate in the land, he can have none in its proceeds. The common law gave a resulting trust in the land, which, but for the statute, would have vested in the plaintiff. Upon grounds of public policy, none of which is violated by this case, the statute forbade such a concealment of title. The plaintiff, let us assume, paid the consideration for this grant, which vested in the defendant both the interest of Box as mortgagee and the equity of Joseph Bork as mortgagor. Under the circumstances, it was inequitable for the defendant to refuse to recognize the oral trust which he assumed. So long as he held the title to the land, he might have invoked the protection of the statute. But pursuant to his oral trust, he converted the land into money. The law, perceiving that to hold otherwise would promote injustice, says to the defendant, You had the statutory protection so long as you kept the property intrusted to you within its terms, but you have voluntarily and justly converted it into money, and thus withdrawn it from the shield of

the statute. The plaintiff converted his money into land, and allowed you to hold the land exempt from the legal trust and bound only by the moral one. He thus voluntarily placed his property beyond his legal reach. You have now voluntarily reconverted it into money, and thus replaced it within his legal reach. It was his originally, in good conscience; it was his when the statute enabled you to deny his right; it is now, in good conscience, his, with the statutory bar to his taking it voluntarily removed by you. Justice desires to award it to him, and thus finds its way to do it.

If the defendant should say that he now can keep the money, because he might once have kept the land, still the plaintiff can say with better justice that he is now entitled to the money because it was originally his, and though he voluntarily suspended his right to it for a season, he did so without lawful consideration, and in confidence that when it could be restored to him it would be. That time has come, and there is no obstacle to its restoration.

The allegation in the complaint, that the defendant "has fraudulently and dishonestly appropriated the said moneys and converted them to his own use," is an unnecessarily strong characterization of defendant's refusal to pay them over to the plaintiff. We do not think the pleader intended to frame his complaint as for trover, and this characterization may be rejected, and still leave stated the cause of action upon which the recovery was had.

The objection that the plaintiff voluntarily paid the purchase-money to defendant's wife upon defendant's request is not supported by the facts. The defendant had the right to receive the purchase-money in the first instance, and therefore the right to refuse to let the deeds go out of his hands until it was paid to him. The plaintiff had the right, if he chose to do so, to advance it for the purchasers. The defendant simply received what he had the right to ask in his capacity as agent, namely, payment of the purchase price upon delivery of the deeds.

By adding to that right an unfounded claim did not convert the satisfaction of the claim properly made into a concession of the improper one.

The judgment should be affirmed.

v. *Brison*, 75 Cal. 525; 7 Am. St. Rep. 189; nor to resulting trusts, *Reynolds v. Sumner*, 126 Ill. 58; 9 Am. St. Rep. 523; *Hall v. Hall*, 107 Mo. 101; *Dover v. Rhea*, 108 N. C. 88; nor to trusts in personal property: *Kimball v. Morton*, 5 N. J. Eq. 1; 43 Am. Dec. 621; *Matter of Carpenter*, 131 N. Y. 86; *Harris v. Bratton*, 34 S. C. 259. Thus where one receives a deed absolute in form, but intended as security only, and with a promise to reconvey on payment, he becomes trustee for the grantor to the extent of the grantor's interest therein: *Jasper v. Hazen*, 1 N. D. 75. And if one acquires the legal title to property in any unconscientious manner so that he cannot equitably retain the property which really belongs to another, equity will impress the property with a constructive trust in favor of one who in good conscience is entitled to it: *Dray v. Dray*, 21 Or. 59. That land conveyed to one partner belonged to the firm may be shown by parol evidence of facts showing such trust; that is, by whom the consideration was paid, and for what purpose the grantee held it: *Kempner v. Rosenthal*, 81 Tex. 12. But in an action to enforce a trust in land, a plaintiff who has parted with nothing cannot show by parol that a grantor conveying land by a deed absolute had an oral agreement with the grantee that the latter should have a life estate in the land, and hold the remainder in trust for said plaintiff: *Stonehill v. Swartz*, 129 Ind. 310. After the trust has been terminated by a conveyance of the property by the trustee, it is competent to prove the trust by parol evidence: *Silvers v. Potter*, 43 N. J. Eq. 539. The evidence, however, to establish a parol trust in lands must be clear and cogent: *Taylor v. Von Schraeder*, 107 Mo. 206; *Robinson v. Jones*, 31 Neb. 20. But where there are no special circumstances rendering it unconscionable for the grantee to retain the property, equity will not interfere. Thus a parol agreement, made at the time of the conveyance of real estate, that the grantee shall hold the property for the grantor until sold, and then pay the proceeds to him, is void: *Wolford v. Farnham*, 44 Minn. 159; compare *Gee v. Thrallkill*, 45 Kan. 173. The same rule prevails if the agreement is to reconvey on a certain contingency: *Biggins v. Biggins*, 133 Ill. 211.

## NEW YORK RUBBER COMPANY v. ROTHERY.

[182 NEW YORK, 298.]

**RIPARIAN RIGHTS.** — THE FACT THAT A LAND-OWNER HAS NO USE FOR WATERS diverted from a stream passing through his land does not preclude him from recovering nominal damages for such diversion.

**RIPARIAN OWNER MAY SUSTAIN AN ACTION TO RECOVER NOMINAL DAMAGES** for perceptibly and materially reducing the volume or current of water which would otherwise have flowed by his premises, though he does not sustain any actual or perceptible damage.

**ACTION** to recover for the diversion of the waters of Matteawan Creek, which ran in front of two lots owned by the plaintiff, his title extending to the thread of the stream. The defendants owned lands on the bank of the stream opposite to and also extending above plaintiff's lands. A dam had been constructed by defendants across the creek above plaintiff's lots,

by means of which the waters of the creek were diverted into a raceway and carried to defendant's factory, and there discharged into the creek below plaintiff's upper lot and below the middle of his lower lot. By this raceway, all the waters of the creek, except such as escaped through leakage, were diverted. The plaintiff did not use his lots for manufacturing purposes, and there was no evidence of any special damages resulting to him from the diversion. Verdict and judgment in favor of defendants.

*B. F. Lee*, for the appellant.

*H. H. Hustis*, for the respondents.

LONDON, J. Upon the former appeal (107 N. Y. 310; 1 Am. St. Rep. 822) this court held that it was for the jury to determine upon the evidence whether the plaintiff's riparian rights were injured by the defendants' use of the water; that the test was, whether the use "was such that at various times the quantity which would otherwise have flowed past plaintiff's lots was perceptibly and materially diminished, and to such an extent that frequently when the water was running through the tail-race of defendants there was none running over or through the dam except leakage, and of course none flowing past the plaintiff's lots, the whole substantial part of the water of the stream going through defendant's tail-race instead of down its original and natural channel." Upon the retrial the evidence was addressed to this subject, and the question presented upon the present appeal is, whether the plaintiff's exceptions to the charge of the learned trial court and to the refusals to charge are valid.

The court charged the jury that if the defendants used and diverted the water to a degree that materially and appreciably lessened its flow along the lots of the plaintiff, the plaintiff was entitled to recover nominal damages. But the court also charged: "These defendants have the right to use this water to run their wheel, provided they do not interfere with the stream to an extent which you can say is both appreciable and material. That question will, of course, be determined with reference to the land as it was, and not with reference to the future for an instant. Be sure as to that; do not change the question from just what it is: Have the Rotherys, by this watercourse, diverted the water so as to leave the stream to a material and appreciable extent insufficient for the purposes

of plaintiff's business? Now, gentlemen, that is all there is of the case." The plaintiff excepted to this portion of the charge, and requested the court to charge "that the plaintiff's right to maintain this action, and to recover a verdict for nominal damages, does not depend at all upon the plaintiff's showing any actual or any perceptible damage, but solely upon the question whether the defendants have, by the use of their race at any season of the year diverted water from Matteawan Creek, and thereby have reduced perceptibly and materially the volume or current of water which otherwise would have flowed by the plaintiff's premises." This was refused.

Both the charge and refusal were erroneous.

The plaintiff's right to recover nominal damages was substantial, though the quantity of damages was not. The defendants probably did leave water enough in the stream for the purposes of the plaintiff's business, as that business had been conducted. But the plaintiff's title to its water rights, and its right to redress for their invasion, were not conditional upon the beneficial user of them: *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191; *Crooker v. Bragg*, 10 Wend. 260; 25 Am. Dec. 555; *Webb v. Portland Mfg. Co.*, 3 Sum. 189; *Parker v. Griswold*, 17 Conn. 288; 42 Am. Dec. 789; *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438; 27 Am. St. Rep. 710.

The plaintiff may, however, lose its title by the defendants' prolonged adverse user of the water of the stream, and this is the more probable if such adverse user is protected by the verdict of the jury. It is not improbable that this action was brought to prevent the defendants from acquiring a prescriptive right to divert the water. The charge which makes "the purposes of the plaintiff's business" material to its right to recover, and cautions the jury to regard plaintiff's land "as it was, and not with reference to the future," tended to lead the jury to disregard the inviolable character of the plaintiff's property rights, or at least expose them to sacrifice if plaintiff's actual and immediate pecuniary damages were inappreciable. The plaintiff might thus lose its right to the beneficial use of the water as it was accustomed to flow before defendants began to divert it, simply because it had not as yet found it convenient to use it. In such a case, nominal damages given confirm the plaintiff's right, but withheld, impeach and may destroy it: *Hammond v. Zehner*, 21 N. Y. 118.

The request to charge presented the plaintiff's rights clearly: *Garwood v. New York C. & H. R. R. Co.*, 116 N. Y. 649.



The defendants' counsel contends, and his contention is not wholly unsupported, that the court did, in his main charge, instruct the jury substantially as the plaintiff requested, and also instructed the jury substantially and nearly literally in the language of the opinion of this court. The evidence, however, tends to show that the defendants diverted into their race nearly the whole volume of the stream, during a considerable portion of each year, leaving only the small part which escaped from the dam through leakage to flow past the plaintiff's upper lot and the greater part of its lower one. The verdict can hardly be accounted for, except upon the theory that the jury were influenced by that portion of the charge, and by that refusal to charge upon which we have commented. These seem to have prejudiced the plaintiff.

The judgment should be reversed, and a new trial granted, costs to abide the event.

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A RIPARIAN PROPRIETOR IS ENTITLED to nominal damages for any disturbance of his rights by diversion of the waters from the stream without returning them to the natural channel, although he offers no evidence of actual or special damage: *Ulbricht v. Tusculum Water Co.*, 86 Ala. 587; 11 Am. St. Rep. 72, and note. As to the restraint of diversion by injunction, see same case. The right of the owner of land to have a well-defined water-course continue to flow through it does not depend on the length of the stream above him, not is it affected by the fact that the source of the stream is a spring on the adjoining land of another, who has diverted the water directly from the spring itself: *Osawet v. Hill*, 93 Cal. 407.

DIVERSION OF STREAM FOR IRRIGATION. — Upper riparian owner in California has the right to the reasonable use of the water of a natural stream for irrigating the riparian land, though such use may appreciably diminish the flow for those below him; and what is a reasonable use is a question of fact, depending upon the circumstances in each case: *Harris v. Harrison*, 93 Cal. 676; *Heilbron v. Land and Water Co.*, 80 Cal. 189.

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## HELWIG v. MUTUAL LIFE INSURANCE COMPANY.

[122 NEW YORK, 331.]

### INSURANCE — EFFECT OF STATEMENT OF PHYSICIAN IN PROOFS OF LOSS. —

If the proofs of loss offered in favor of the plaintiff in an action upon a policy of life insurance contain the statement of the physician who attended the deceased in his last illness, verified by his oath, from which it appears that the statements made by the deceased in his application for insurance, with respect to the last time he had been attended by a physician, and the cause, were false, such certificate constitutes evidence in favor of the insurer, which it is entitled to have the jury consider.

though it was not necessary that the certificate should have contained anything except proof of the death of the assured.

**WITNESS, EVIDENCE OF PHYSICIAN.** — The fact that the defendant, in an action upon a policy of life insurance, would not have been permitted to produce in evidence the declarations of the physician of the deceased, does not preclude defendant from relying upon such declaration, when it constituted part of the evidence offered and received on behalf of the plaintiff.

*Robert Sewell*, for the appellant.

*A. Simis, Jr.*, for the respondent.

**BRADLEY, J.** The policy of insurance which is the subject of this action was made upon the application of Richard W. Helwig, August 17, 1887, and by it the defendant, upon certain conditions, undertook to pay to the plaintiff, his wife, upon his death five thousand dollars. The application was part of the contract, and the answers by him to defendant's medical examiner were in continuation of the application, and were warranted by the insured to be true. Amongst those questions and answers were the following: "When last attended by physician and cause? Six years ago; measles. Name and address of the physician? Dr. Langsman, New York." The charge is, that those answers were untrue, and that the consequence was a breach of the warranty. And in support of that charge, reference is made by the defendant's counsel to the attending physician's certificate, made in January, 1888 (verified by his oath), of the death of the insured in December, 1887, in which certificate appear the following questions and answers: "Were you his medical attendant or adviser before his last illness? Yes. If so, for what disease, and when? For astralgia, about one and one half years ago."

It is urged that nothing in this certificate can be treated as evidence of breach of warranty, because it was made to furnish proofs of the death of the insured; and that the matter of the declaration in question of the physician was such as he would not be permitted to disclose as a witness. It is true that by the contract the furnishing of proofs of death of the insured was made a condition precedent to the liability of the defendant. But by the policy it does not appear that the beneficiary of the insurance was to do anything more in that respect than to furnish to the defendant satisfactory proofs of death of the insured, upon the acceptance of which, and upon the conditions referred to in the policy, the defendant undertook to pay the amount of the insurance, so that it was not essential to such

proofs to represent his condition or medical treatment preceding the time of his death. It must be assumed that the certificate was put in evidence by the plaintiff, as it appears in the record after the case was opened on her part, and before she rested; and in that view those statements of the physician were made evidence, and tended to prove that the answers before mentioned of the insured to the questions of the medical examiner were untrue, so far as they related to the time he had been last attended by a physician for medical treatment: *Insurance Co. v. Newton*, 22 Wall. 32; *Buffalo L. T. & S. D. Co. v. Knights T. & M. M. A. Ass'n*, 126 N. Y. 450; 22 Am. St. Rep. 839.

The fact that the defendant would not have been permitted to introduce in evidence this declaration of the physician appearing in the certificate is not important for the purposes of the question here presented, as the certificate was made evidence by the plaintiff without, so far as appears, any qualification.

If, as claimed by the plaintiff's counsel, the blank certificate was furnished by the company, it is not seen how that fact aids the plaintiff on this review.

The court was requested by the defendant's counsel to charge the jury that this statement of the doctor in the proofs of death was to be taken into consideration by them. And the exception to the refusal to so charge was well taken.

For that error the judgment should be reversed and a new trial granted, costs to abide the event.

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COMMUNICATIONS MADE TO PHYSICIANS: See note to *Thompson v. Ish*, 17 Am. St. Rep. 565-571, and especially 569, 570, as to the waiver of the privilege before and after the death of the patient. The general rule is, that where the evidence of the attending physician is offered by the patient or his representatives, it is competent and admissible, and not otherwise: *Grell v. Tower*, 85 Mo. 249; 55 Am. Rep. 358.

PROOFS OF DEATH. — In the absence of a usage known to the assured, or a special provision in the policy requiring that the certificate of the attending physician of the assured shall be furnished as part of the proofs of death, such certificate cannot be required: *Buffalo Loan etc. Co. v. Knights T. Ass'n*, 126 N. Y. 450; 22 Am. St. Rep. 839.

COOPER v. UNITED STATES MUTUAL BENEFIT ASS'N.

[132 NEW YORK, 334.]

**INSURANCE, TIME WITHIN WHICH ACTION MAY BE BROUGHT.**—When a certificate is issued insuring the person therein named against injury, and agreeing to pay him certain sums if such injury disables him from transacting business, and in case his death should result therefrom, then to pay his wife a sum specified, and declaring that no suit shall be brought except within one year of the alleged accidental injury, such time, in the event of his death, is to be computed therefrom, because it is not until such death that the wife receives any injury as a result of the accident.

*William Bro Smith*, for the appellant.

*Lewis E. Carr*, for the respondent.

HAIGHT, J. This action was brought upon a certificate of insurance, issued by the defendant, to recover five thousand dollars.

The defendant, by its certificate, undertook to insure Theodore H. Cooper against personal bodily injury; and in case he should receive such injuries, disabling him from transacting business pertaining to his occupation, to pay him certain amounts specifically named in the certificate, dependent upon the nature of his injuries; and in case death should result from such injuries within ninety days, to pay to the plaintiff, as his wife, the sum of five thousand dollars.

The certificate contained the following: "No suit or proceeding at law or in equity shall be brought . . . to recover any sum under this insurance unless the same is commenced within one year from the time of the alleged accidental injury."

Cooper received an accidental bodily injury on December 10, 1887, which resulted in his death on January 2, 1888.

This action was commenced on December 29, 1888, more than one year after the accident, but within one year of his death.

It is claimed that the action was not commenced within the time required by the provision of the certificate referred to.

It will be observed that provisions are made in the certificate for two different persons, who, upon the happening of the events specified, may have a right of action against the association. One provision is in favor of Cooper, who may recover during his lifetime the amounts provided for his disability resulting from the accidental injury received. The other is to

his wife, which is for the injuries which she suffers by reason of his death, resulting from such accident.

The accident received by Cooper did not injure the plaintiff or give her a right of action until death ensued. So far as she is concerned, the infliction of the wound is but the beginning and the death is the completion of the injury. Her suit must be "commenced within one year from the time of the alleged accidental injury." In other words, within one year from the time of the injury to her, which was the death of her husband, as the result of the accident.

As to Cooper, he suffered from the date of the wound. His right to indemnity dates from that event, and it is possible that his right to maintain an action would not continue after the expiration of a year from that date.

But as to the plaintiff, it appears to us that the construction already indicated was intended, and should be given to the certificate. As thus construed, the various clauses of the contract are rendered harmonious, and the different beneficiaries thereunder are given the same period of limitation within which to bring actions to establish their claims.

This construction is, in a measure, sustained by the authorities.

In the case of *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 315, 42 Am. Rep. 297, the policy of insurance required actions to be brought within twelve months next after the "loss or damage shall accrue." In an action upon the policy, it was held that the period of limitation prescribed did not commence to run until the loss became due and payable, and the right to bring an action had accrued.

And to the same effect are the cases of *Mayor etc. v. Hamilton Fire Ins. Co.*, 39 N. Y. 45; 100 Am. Dec. 400; and *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607.

The case of *King v. Watertown Fire Ins. Co.*, 47 Hun, 1, appears to us to be clearly distinguishable. In that case the policy provided that no suit or action could be maintained unless commenced "within twelve months next after the fire shall have occurred." In that case it was held that the year within which the action must be brought commenced to run from the date on which the fire occurred, it so having been expressly stipulated in the policy.

We consequently are of the opinion that the judgment should be affirmed, with costs.

**LIMITATIONS OF ACTIONS ON INSURANCE POLICIES.**—This subject is discussed, and numerous cases cited, in the note to *Matt v. Iowa etc. Ass'n*, 25 Am. St. Rep. 485. Considering the ease with which policies could be drawn in terms which would preclude all possibility of dispute as to the time within which actions upon them must be brought, it is not a little remarkable that those instruments should still contain any words or phrases calculated to foster litigation on this subject. The cases are very numerous, and to some extent conflicting; but in regard to fire insurance policies, the conclusions which it appears allowable to deduce from the authorities in their present condition are as follows: Where the action is to be brought within a certain time "after the fire," or "after the date of the fire," the fact that the loss shall not be payable until a certain time has elapsed after the fire will not entitle the assured to reckon the stipulated period of limitation from the expiration of that time: *State Ins. Co. v. Meesman*, 2 Wash. 459; 28 Am. St. Rep. 870. The reasoning of the dissenting judge, who sought to show that the "date of the fire" was not the time when the fire occurred, but the time when the loss became payable, fails to convince us that this is not a proper case for the application of the rule, that words are to be taken in their obvious sense. In *Travelers Ins. Co. v. California Ins. Co.*, 1 N. D. 151, the words "after a loss occurs" were construed to be the equivalent of "after the date of the fire"; but this theory was repudiated in *Murdock v. Franklin Ins. Co.*, 33 W. Va. 407, and *Sun Ins. Co. v. Jones*, 54 Ark. 376. It is hard to see by what principle the latter construction can be justified, unless it be by an extremely strong application of the maxim, *Verba chartarum fortius accipiuntur contra proferentem*. If the policy provides that suit must be brought within a certain time "after the cause of action accrues," there is an overwhelming weight of authority in favor of the view that the period of limitation does not begin to run until the lapse of the time *before which* action cannot be brought: See note to *Matt v. Iowa etc. Ass'n*, 25 Am. St. Rep. 485. To this weight of authority courts will probably feel bound to defer, but if the question were *res integra*, it would be worthy of consideration whether the decisions supporting this doctrine are not due to a confusion between the meanings of the phrases "right of action" and "cause of action." The "cause of action" means nothing more or less than "the facts which constitute the cause of action"; Bliss on Code Pleading; and though there may not be a "right of action" until some time after the events creating that right have occurred, that cannot change the date of the events themselves. The "fact constituting the cause of action" is the fire which has destroyed the property of the assured, and the stipulation not to sue until the company have had the time thought to be necessary for the purpose of making the investigations which will enable it to decide whether to pay the policy or refuse to do so does not render that "fact" any the less the plaintiff's "cause of action." Ordinarily the "right of action" accrues at the same time as the "cause of action." But there is no reason why a plaintiff should not agree to postpone his "right of action," and this seems to be the effect intended to follow from the introduction of this provision into the policy.

## AMERMAN v. DEANE.

[132 NEW YORK, 355.]

**COVENANT RESTRAINING THE USE OF LAND WILL NOT BE SPECIFICALLY PERFORMED** when there has been such a change in the character of the neighborhood as to defeat the object and purpose of such covenant, and to render it inequitable to deprive the owner of the property subject to such covenant of the privilege of conforming his property to that character.

**INJUNCTION WILL NOT ISSUE WHEN THE RELIEF SOUGHT IS DISPROPORTIONATE TO THE NATURE AND EXTENT OF THE INJURY SUSTAINED** or likely to be sustained. Therefore, where lands have been conveyed with restrictive covenants limiting their use, and the condition and character of the adjoining land with reference to that conveyed have so changed as to render the restriction in the conveyance inapplicable according to its true intent and spirit, equity will not interpose by injunction to prevent the breach of the covenant, but will leave the party aggrieved to his remedy at law.

**INJUNCTION. — COVENANT AGAINST THE ERECTION OF ANY TENEMENT-HOUSE** on any part of the premises conveyed will not be specifically enforced in equity by an injunction, when flats and tenement-houses have already been erected upon the greater portion of the adjacent lots. The only redress upon such covenants is by compensation in damages.

**DAMAGES FOR THE ERECTION OF A TENEMENT-HOUSE** in violation of a restrictive covenant need not be limited to those suffered at and before the commencement of the suit, but may be estimated upon the theory that such house will be permanently used as a tenement-house, where it is a permanent structure especially erected for continued use as a flat or tenement-house. As its use as such is lawful, there is no presumption that it will be discontinued.

**RELEASE FROM RESTRICTIVE COVENANTS IN A DEED SHOULD BE DECREED** to be executed when a judgment is entered awarding plaintiff damages for the permanent injuries sustained by him by reason of the breach of such covenants.

*W. J. Townsend*, for the appellant.

*Cephas Brainerd*, for the respondent.

**HAIGHT, J.** This action was brought for a permanent injunction, and for damages.

Clarence S. Brown was the former owner of a block of land in the city of New York, bounded on the north by Sixty-fourth Street, on the east by Ninth Avenue, on the south by Sixty-third Street, and on the west by Tenth Avenue. He made conveyances of separate parts of such block to different parties, all of which conveyances were made subject to certain restrictions and covenants, among which was that the grantee, his heirs and assigns, would not, at any time thereafter, erect, suffer, or permit upon the premises thereby conveyed, or any part thereof, any tenement-house; and it was agreed between

the parties to such conveyance that such covenants should run with the land.

The defendant, through various mesne conveyances from Brown, under deeds containing the restriction and covenant above mentioned, has become the owner of a lot on the south-east corner of Tenth Avenue and Sixty-fourth Street; the plaintiff, in like manner, has become the owner of a private residence on the south side of Sixty-fourth Street, distant forty-two feet and nine inches easterly from the rear of defendant's lot. Since the purchase by the plaintiff of her residence, the defendant has erected upon her lot a tenement-house, in violation of the restriction and covenant alluded to. The building contains a frontage of seventy-five feet on Tenth Avenue, and ninety-five feet on Sixty-fourth Street. It is arranged for three stores fronting upon the avenue, and three stores fronting upon Sixty-fourth Street, with four stories above the first floor, each arranged for the accommodation of four families.

Flat or tenement houses of the ordinary description have been erected for a considerable distance below Sixty-third Street, on both sides of Tenth Avenue; also on the opposite side of Tenth Avenue, between Sixty-third and Sixty-fourth streets; also upon the entire block fronting on the easterly side of Tenth Avenue from Sixty-fourth Street to Sixty-fifth Street; also in the middle of the block between Ninth and Tenth avenues on the northerly side of Sixty-third Street; ordinary tenement-houses have been built on the southerly side of Sixty-third Street, from Ninth Avenue westwardly, covering more than half of the block; flat or tenement houses have been built opposite the premises of the plaintiff, on the northerly side of Sixty-fourth Street, and like houses have been built for a considerable distance northward on both sides of Tenth Avenue. On the northwesterly corner of Tenth Avenue and Sixty-fifth Street is an establishment for the manufacture of illuminating gas, and on the block below, on the westerly side of Tenth Avenue, are carpenter-shops, liquor and beer saloons, blacksmith-shops, and one tenement or flat house.

The trial court refused a permanent injunction, but awarded damages to the plaintiff in the sum of fifteen hundred dollars, and an injunction restraining the defendant from renting the building upon her lot to any tenant until such damages, together with the costs of the action, shall be paid.

The facts to which we have alluded were found by the trial court, and are such as to entitle the plaintiff to an injunction,



were it not for the fact that the surrounding neighborhood has been chiefly built up and occupied with flat or tenement houses. The defendant's building is a large one, constructed at considerable expense, and is in a neighborhood devoted chiefly to the residence of people for which the defendant's building was designed; if enjoined from using the same for that purpose, the defendant must necessarily suffer damages greatly in excess of any which is likely or possible to be sustained by the plaintiff.

In the case of *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365, it was held, that whilst a court of equity has jurisdiction to enforce the observance of covenants made by an owner of lands in a city, with an adjoining owner, in consideration of similar reciprocal covenants on the part of the latter, restricting the use of the lands to the purposes of private residences, the exercise of this authority is within its discretion; and where there has been such a change in the character of the neighborhood as to defeat the object and purposes of the agreement, and to render it inequitable to deprive such owner of the privilege of conforming his property to that character, such relief will not be granted.

In High on Injunctions, sec. 22, it is said, if it is apparent, upon an application for an injunction, that the relief sought is disproportioned to the nature and extent of the injury sustained or likely to be sustained, the court will decline to interfere. And again at section 1158, where the character and condition of the adjoining lands, with reference to that conveyed, have so changed as to render the restriction in the conveyance inapplicable, according to its true intent and spirit, a court of equity will not interfere by injunction to prevent a breach of the covenant, but will leave the party aggrieved to his remedy at law. See also *Conger v. New York etc. R. R. Co.*, 120 N. Y. 29; *Margraf v. Muir*, 57 N. Y. 155; *Peters v. Delaplaine*, 49 N. Y. 362.

Under the rule to which we have called attention, and the facts disclosed, the trial court properly withheld a permanent injunction, and confined the relief of the plaintiff to damages.

As we have seen, the trial court awarded fifteen hundred dollars as damages. This was found to be the difference in value of the plaintiff's premises, with and without the defendant's tenement building. The award is for the permanent injury sustained. The defendant's building was in process of construction when this action was brought. At the time of

the trial, it had been completed, but was only partially occupied. The plaintiff's damages depended not upon the construction of the building, but the use made of it. If it should never be used for a tenement building, no damages would result, and if, as is claimed, damages only could be awarded to the time the action was commenced, none could be allowed, for the reason that at that time none had been sustained. It appears to have been upon this theory that the general term ordered the reversal of the judgment, following the cases of *Pond v. Metropolitan El. R'y Co.*, 112 N. Y. 186; 8 Am. St. Rep. 734; *Uline v. New York C. & H. R. R. Co.*, 101 N. Y. 98; 54 Am. Rep. 661, and other kindred cases; but those cases were actions for damages, and were disposed of upon the theory that as to the plaintiff there was an unlawful structure upon his easement, amounting to a nuisance. That being a nuisance, the defendant was under a legal obligation to remove it, and the law would not presume that he would not do so. For that reason damages could only be recovered up to the time of the commencement of the action.

We do not regard these cases as having any application to the question under consideration. The defendant's building does not encumber or interfere with any easement of the plaintiff; it is not unlawful or a nuisance. There is consequently no presumption that it will be abated or discontinued. The devoting of it to the use for which it was constructed operates as a breach of the covenant embraced in the deeds to which we have alluded, and because of such breach, the plaintiff is entitled to damages. The building is a permanent structure, specially arranged for continued use as a tenement or flat house. This action is in equity, and one of the objects sought is to avoid a multiplicity of actions which might be brought in case only past damages could be recovered.

We see no reason why permanent damages may not be awarded. This right is recognized by the recent cases.

In *Pappenheim v. Metropolitan El. R'y Co.*, 128 N. Y. 436, 26 Am. St. Rep. 486, Peckman, J., in delivering the opinion of the court, says: "In an action at law, the owner of the property interfered with or trespassed upon cannot recover damages to his premises, based upon the assumption that such trespass is to be permanent. He can only recover the damages which he has sustained up to the commencement of the action. . . . But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus

prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that upon payment of that sum the plaintiff shall give a deed or convey the right to the defendant." See also *Thompson v. Manhattan R'y Co.*, 41 N. Y. St. Rep. 697; *Henderson v. New York Cent. R. R. Co.*, 78 N. Y. 423-434.

We discover no exceptions in the case that call for a reversal of the judgment. Evidence was received in reference to there being windows on the east end of the building, but it was received only for the purpose of showing the kind of house that was erected, and no claim for damages was made by reason of such windows. To the question as to what the effect would have been upon the plaintiff's property, if instead of the house erected by Mrs. Deane there had been placed houses corresponding in quality and character to those which front on Tenth Avenue above Sixty-fourth Street, the answer of the witness is, that he did not know the character of those houses. He does not pretend to speak as to the effect, and consequently the exception taken is not available. His answer to the next question is in favor of the defendant, and consequently did her no harm.

The damages awarded by the trial court was for the permanent injury sustained by the plaintiff by reason of the breach of the covenant alluded to. Under the practice adopted in kindred cases, the trial court might properly have required the plaintiff, upon the receipt of the damages awarded, to have duly executed, acknowledged, and delivered to the defendant a release from the covenant, so far as it restricts the use of the premises for the purpose of a tenement-house. Whilst this requirement may not be necessary to bar a further action for damages, it seems but just, under the circumstances and in view of the liberal award made, that the release should be given.

The order of the general term will therefore be affirmed, and judgment absolute ordered against the appellant upon her stipulation, with costs, unless within thirty days she stipulates that the judgment of the trial court be modified, by adding thereto a provision that upon the payment to her of the damages and costs awarded by the trial court she execute, acknowledge, and deliver to the defendant a release from the covenant embraced in the deed, so far as it restricts the use of

the premises for the purpose of a tenement-house. If such stipulation is given, the order of the general term is reversed, and the judgment of the trial court, as so modified, is affirmed, without costs.

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**COVENANTS RESTRICTING THE USE OF LAND.** — As to when changes in condition of property will justify refusal of equity to enforce such covenants, see note to *Ladd v. Boston*, 21 Am. St. Rep. 498.

**PROSPECTIVE DAMAGES.** — This subject is discussed in the note to *Hargreaves v. Kimberly*, 53 Am. Rep. 123-139. The general rule is, that only the damages which have accrued before the action is commenced can be recovered. This principle is explained and illustrated by numerous cases in that note; See also *Whipple v. Fairhaven*, 63 Vt. 221. The exceptions are those cases in which there is no new unlawful act, but merely additional damage: *Warner v. Bacon*, 8 Gray, 397; 69 Am. Dec. 253. In such cases, as a subsequent action cannot be brought, all the damages, past as well as future, must be assessed in the first suit. An application of this rule to the case of a personal injury will be found in *Kane v. New York etc. R. R. Co.*, 132 N. Y. 160.

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## HAEBLER v. MYERS.

[132 NEW YORK, 362.]

**JUDGMENTS.** — **RESTITUTION** was a remedy well known at the common law.

Its object was to restore to the appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was usually a part of the judgment of reversal which directed "that the defendant be restored to all things which he has lost on occasion of the judgment afore said."

**JUDGMENT.** — **A WRIT OF RESTITUTION ISSUED AT THE COMMON LAW** upon the reversal of a judgment, provided the amount which the appellant had lost, or paid under compulsion, appeared of record. Otherwise, process in the nature of an order to show cause first issued, known as *scire facias quare restitutionem habere non debet*, based upon the theory that the law infers a promise to repay moneys paid upon or in satisfaction of a judgment or order which has been reversed.

**JUDGMENTS.** — **RESTITUTION WILL BE ENFORCED THOUGH THE MONEY WAS NOT RECEIVED UNDER AN EXECUTION**, nor under a final judgment. Hence, if moneys have been paid to the sheriff under an attachment, and persons claiming as lien-holders procure an order vacating the attachment, and thereupon the sheriff pays such moneys to them, and the order vacating the attachment is afterwards reversed upon appeal, the attaching creditors, having in the mean time recovered final judgment in their action, are thereupon entitled to recover from such lien claimants the moneys thus obtained by them. The law interposes a promise to pay such moneys to the attaching creditors, because, though they did not hold the title, they did have a paramount lien, which, in due course of procedure, would have ripened into title but for the erroneous order vacating the attachment.

**ACTION** for money had and received. Nine hundred dollars had been received by the sheriff of the city and county of New York, under and by reason of an attachment issued in favor of the plaintiffs and against Bernharth and others. Afterwards, the defendants, claiming as lienors, procured an order restraining the sheriff from paying such moneys to the plaintiffs, and a few days later obtained an order vacating the attachment. As a consequence of this latter order, the sheriff paid the defendants such nine hundred dollars. The order vacating the attachment was finally reversed by the court of appeals, in October, 1889. In November of the previous year plaintiffs had recovered judgment in their action against Bernharth and others for a sum exceeding the amount of money which had been paid to the sheriff on the attachment, and an execution issued on such judgment was returned wholly unsatisfied. The plaintiffs having demanded of the defendants restitution of the said nine hundred dollars, and such demand being refused, this action was commenced, and it was asked that the defendants be directed to make restitution to the plaintiffs of the said sum. To the plaintiff's complaint, disclosing facts hereinbefore stated, a demurrer was interposed, which was sustained by the special term, and this decision was affirmed by the general term on appeal thereto.

*Marshall P. Stafford*, for the appellants.

*Michael H. Cardozo*, for the respondents.

VANN, J. Restitution was a remedy well known to the common law. Its object was to restore to an appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was not created by statute, but was exercised by the appellate tribunal as incidental to its power to correct errors, and hence the court not only reversed the erroneous judgment, but restored to the aggrieved party that which he had lost in consequence thereof. It was usually a part of the judgment of reversal, which directed "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid."

A writ of restitution was thereupon issued, provided the amount that the appellant had lost, or paid under compulsion, appeared of record, as by the return of an execution satisfied. Otherwise process in the nature of an order to show cause was first issued, known as a *scire facias quare restitutionem*

*habere non debet*: Tomlin's Law Dict., tit. Restitution; 2 Till. Abr. 472; Rolle Abr. 778; *Westerne v. Creswick*, 4 Mod. 161; *Wilkinson's Case*, Cro. Eliz. 465; *Goodyere v. Ince*, Cro. Jac. 246; *Manning's Case*, 4 Coke, 94; 2 Tidd's Practice, 1033; 1 Burrill's Practice, 292.

In this state the practice is now regulated by statute, and almost every conceivable case is provided for: Code Civ. Proc., secs. 445, 1005, 1216, 1292, 1323, 2142, 2263, 3058. Section 1323 seems especially adapted to the facts set forth in the complaint, as it provides that "where a final judgment or order is reversed or modified upon appeal, the appellate court . . . may make or compel restitution of property, or of a right lost by means of the erroneous judgment or order." This is a part of section 330 of Code of Procedure, under which it was held that the power conferred was cumulative, and did not take away the common-law rights of a successful appellant: *Lott v. Swezey*, 29 Barb. 87, 88. There were earlier, though less complete, statutes upon the subject: Laws 1832, c. 128, sec. 1; 2 Rev. Stats. 509, sec. 13; 1 Rev. Laws, 96, secs. 2, 5.

The statutory remedy is exercised by the entry of a judgment or order in the action in which the erroneous judgment or order was rendered or made. We think that the remedies provided by statute are not exclusive, and that they were enacted, in recognition of the right of restitution as it existed at common law, to furnish additional means of enforcing that right.

We have before us an effort to procure restitution by an independent action in the nature of *indebitatus assumpsit*, based upon the theory that the law will imply a promise from the conduct of the defendants and the circumstances of the case. It has been repeatedly held that such an action will lie to recover back money paid on a judgment pending an appeal which resulted in a reversal. The subject was carefully examined in *Clark v. Pinney*, 6 Cow. 298, where it was held that the court would not compel the party to resort to the antiquated remedy of *scire facias*, but would permit a recovery by a direct action, as for money had and received. In delivering the opinion, Chief Justice Savage said: "The general proposition is, that this action lies in all cases where the defendant has in his hands money which, *ex æquo et bono* belongs to the plaintiff. When money is collected upon an erroneous judgment, which, subsequent to the payment of the money, is

reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected." This principle was recognized by the supreme court of the United States in *United States Bank v. Bank of Washington*, 6 Pet. 8, where it was declared that "on the reversal of a judgment the law raises an obligation in the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost," and that he might proceed by action, *scire facias*, or order. The authorities uniformly support this position, and out of many that might be cited the following are sufficient to illustrate the subject: *Sturges v. Allis*, 10 Wend. 355; *Maghee v. Kellogg*, 24 Wend. 32; *Norton v. Coons*, 3 Denio, 130; *Langley v. Warner*, 1 Sand. 209; *Lott v. Swezey*, 29 Barb. 87, 88; *Kidd v. Curry*, 29 Hun, 215; *Wright v. Nostrand*, 100 N. Y. 616; *Travelers Ins. Co. v. Heath*, 95 Pa. St. 333.

The right of the plaintiffs to recover could hardly be questioned if the money had absolutely belonged to them when it was paid by the sheriff to the defendants, but inasmuch as they only had a lien upon it, and had not then completed their title, it is claimed that no action will lie for their relief. In taking this position, the defendants lose sight of the fact that a lien is property in the broad sense of that word; and although it has no physical existence, it exists by operation of law so effectively as to have pecuniary value, and to be capable of being bought and sold. They also ignore the proceedings that were in progress to convert the lien into a title to the fund. This makes the successful prosecution of the appeal a barren victory, and enables the party in fault to retain the fruits of his own wrong.

While the erroneous order was a protection to the sheriff, who acted upon it while it was in force, it is no protection to the defendants, because it was subsequently reversed on appeal, and became, as to them, the same as if it had never been made. When they accepted the money that was paid over in consequence of the order that they procured, they knew that if the order should be reversed and their motion denied, they would no longer be entitled to it, and could not in fairness retain it. They also knew that if, in the mean time, the plaintiffs perfected judgment and issued execution, their right to the money, if not paid over, would be complete upon a reversal of the order. As they acted with knowledge of all the facts, it would be inequitable for them to retain money received un-

der such circumstances, and we see no reason why the law should not infer a promise of restitution the same as if the money had been collected under an execution. In either case the inference rests upon the fact that money was received by those who knew at the time that it might ultimately be decided that they were not entitled to it. But to whom did the implied promise run? Obviously to those who would have been entitled to the money upon the reversal of the order, provided it had not been paid to the defendants. It was so held in *Caperton v. McCorkle*, 5 Gratt. 177, which is precisely in point. The law implies the promise for the benefit of the injured party, and if the situation were the same as it was when the money was paid, repayment to the sheriff would be required, because he would be entitled to possession of the fund under the restored attachment: *Pach v. Gilbert*, 124 N. Y. 612. But the situation is changed, as the plaintiffs have become entitled to the money by virtue of their judgment and execution. They, and they alone, therefore, can avail themselves of the implied promise, which is plastic in character, and for the benefit of whom it may concern. The law implies a promise, because in equity and good conscience the defendants ought to have promised, and it will not permit them to say that they did not. It would be an anomaly to hold that the law will imply a promise in favor of one having title, but not in favor of one holding the first lien, when through the action of agencies known by the parties to be in operation and in the ordinary course of legal procedure, the lien would have ripened into a title but for the erroneous order. The defendants procured the order and acted upon it, and thereby obtained money that did not belong to them; and under such circumstances, the law presumes that they engaged to do what reason and justice require them to do. They are therefore under an obligation to restore the money. In enforcing that obligation the courts will not be particular to require literal restitution to the sheriff, or late sheriff, but as the plaintiffs have now become entitled to the fund, will permit them to recover it in a direct action for money had and received. By imputation of law, the defendants received the money for the benefit of the party ultimately entitled to it, and by refusing to pay it over to that party, upon a proper demand after his rights had matured, became liable to an action for the recovery thereof: *Mason v. Prendergast*, 120 N. Y. 536.

The suggestion that the plaintiffs should have procured a



stay of proceedings is not entitled to much weight, because a stay by order is not a matter of right, while a stay by undertaking upon appealing from a judgment is a matter of right, yet the omission to give an undertaking does not prevent a recovery upon a reversal of the judgment.

We think that the judgments rendered by the courts below should be reversed and the demurrer overruled, with costs in all courts, with leave to the defendants to answer over in twenty days upon payment of costs.

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**MONEY PAID ON A DECREE OF COURT** is not paid voluntarily, and upon its reversal the party paying the money is entitled to restitution, regardless of the final determination of the rights of the parties: *Ex parte Walter*, 89 Ala. 237; 18 Am. St. Rep. 103. See also note to *Quon Wo Chung Co. v. Laumester*, 17 Am. St. Rep. 264-266, as to the effect of a reversal of a judgment. The general rule is, that a reversal of judgment restores parties to their original rights so far as this can be done without prejudice to third persons: *McNilton v. Love*, 13 Ill. 486; 54 Am. Dec. 449; *Tarleton v. Goldthwaite*, 23 Ala. 346; 58 Am. Dec. 296.

**LIEN OF ATTACHMENT — CONTINUANCE OF.** — A judgment against a plaintiff in attachment which is appealed from does not dissolve the attachment, but the lien continues until the final disposition of the case: *Treat v. Dunkham*, 74 Mich. 114; 16 Am. St. Rep. 616; even though a void judgment may have been entered, provided a valid judgment is afterwards entered: *Raynolds v. Ray*, 12 Col. 108.

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## STERGER v. VAN SICKLEN.

[122 NEW YORK, 499.]

**LANDLORD AND TENANT. — COVENANT OF LANDLORD TO REPAIR** does not inure to the benefit of a stranger sustaining an injury because of its breach. But when the occasion of the injury constitutes a nuisance as to the party complaining, then the landlord may be charged with damages, on the ground that he maintains a nuisance, where the contract of letting contains a covenant authorizing him to re-enter for the purpose of making repairs.

**LANDLORD DOES NOT OWE ANY DUTY TO THE OCCUPANT OF ADJACENT PROPERTY**, and if the latter chooses to come upon the property of the landlord then in possession of the tenant, and to go up or down back stairs, from a defect in which an injury results to him, the landlord is not answerable through his contract with the tenant to repair such stairs. As to such third person, they were not a nuisance, because neither his property nor his personal rights were invaded.

**LANDLORD'S LIABILITY TO THIRD PERSONS** is not enlarged by the fact that he has leased premises with a condition that he may re-enter for the purpose of making repairs.

**LICENSEE ENTERING UPON THE PROPERTY OF ANOTHER WITHOUT INVITATION** must take it as he finds it, and cannot recover for injuries sustained by its being out of repair or in a dangerous condition.

ACTION to recover damages for personal injuries sustained by the plaintiff from the breaking of a step on defendant's premises. These premises were at the time of the accident occupied by a tenant, who had entered into possession thereof about two years previously. The plaintiff was the occupant of a house situated four or five feet from that owned by defendant, and separated therefrom in the rear by a fence, some boards of which had been knocked off for the purpose of making an opening. The defendant knew of the condition of the steps and had agreed to repair them, and there was testimony tending to show that he had made an agreement with his tenant by which the latter was to make the repairs for a sum named and deduct it from the rent, but there was other testimony to some extent in conflict with that offered by the defendant upon this subject. Judgment was entered in favor of the defendant in the trial court, and affirmed by the general term on appeal.

*James D. Bell*, for the appellant.

*A. Simis, Jr.*, for the respondent.

PARKER, J. We are of the opinion that the evidence does not permit a recovery.

No contractual relation exists between the plaintiff and defendant. The covenant of the landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach: *Odell v. Solomon*, 99 N. Y. 635.

But when the occasion of the injury constitutes a nuisance as to the party complaining, then a landlord may be chargeable in damages, on the ground that he maintains a nuisance, where the contract of letting contains a covenant authorizing him to re-enter for the purpose of making repairs: *Ahern v. Steele*, 115 N. Y. 203; 12 Am. St. Rep. 778.

We are thus brought to the question whether the decayed steps in the rear of defendant's premises leading from the ground to a stoop constituted a nuisance as to the plaintiff, who occupied an adjoining house. If so, the defendant, by reason of his covenant to repair, may be responsible for the injury occasioned to the plaintiff while walking down them.

This inquiry admits of but one answer, and does not seem to be worthy of the citation of authority, but it may not be out of place to refer to the cases cited by the appellant.

It may be observed in passing that the owner may ordina-

rily exercise such dominion over and make such use of his real estate as he chooses, provided the rights of others are not thereby violated.

No right of the plaintiff was violated. The enjoyment of the premises occupied by her was not interfered with. Had she remained on them the injury would not have occurred. But she chose to go on private property, and up or down back steps, over which she had no authority, and as to which she had acquired no such interest by contract, or otherwise, as would have entitled her to demand as a right that the so-called nuisance be abated. As to her it was not a nuisance, because it did not invade either her property or personal rights: *Murphy v. City of Brooklyn*, 98 N. Y. 642.

Appellant cites *Timlin v. Standard Oil Co.*, 126 N. Y. 514, 22 Am. St. Rep. 845, where it is held that if an owner lease premises without abating an existing nuisance, he is liable to respond in damages for an injury resulting therefrom. But that case has no application here. The nuisance complained of was dangerous to the public and the adjoining owner. The wall of a building was so out of repair that it fell over upon the tracks of a railroad company, killing plaintiff's intestate while engaged in repairing the track.

In *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175, the owner made an excavation on his own land, but so near to the highway as to render travel thereon dangerous and failed to guard it, and the instruction of the trial court to the jury that the excavation was a nuisance if made in the highway, or so near it that a person exercising ordinary care was liable to fall into it, was sustained; the court holding that the circumstances of that case imposed a duty on the defendant to protect the excavation.

It appeared that the excavation had been made in a place long used by the public, and the character of the user was thus described by the court: "It was not the case of a bare permission by the owner to cross his land adjoining a public street. The land had, by use long continued, been made, for the time being, a public place and part of the highway."

While the court held that the situation presented by the evidence supported the judgment, it did not fail to emphasize the general rule that the owner of property has the right to put his property to such use as he chooses, "and in the absence of special circumstances, if a person traveling on a highway deviates therefrom, and falls into a pit or excavation on the ad-

jacent land, the owner is not responsible for the resulting injury."

There are cases where the use to which an owner of property puts it is of such a public character that he is bound to observe reasonable care in keeping it in such a condition as to save harmless those who are invited to come on to it for the benefit and profit of the owner. Cases of this kind are considered by this court in *Clancy v. Byrne*, 56 N. Y. 129; 15 Am. Rep. 391. A drayman, in the ordinary course of his business, drove a horse upon Pier No. 34, North River, and a rotten plank giving way, the horse fell through and was killed. In the opinion by Folger, J., it is said that the occupant is liable for an injury to the property of a person lawfully upon it therewith. "This is not put upon the ground that the south half of the pier was a public place or highway. It was private property to a certain degree, though held as such for public objects. . . . By the use to which it was put by the occupant, from which a profit to him was directly or indirectly derived, and which persons of the calling of the plaintiff aided, there was a license and an invitation given to the plaintiff to come and go over this pier in the following of his employment"; and thus "was imposed on him the duty of taking care, so long as it was thus kept open, that those who had a lawful right to go there could do so without danger to their property."

*Swords v. Edgar*, 59 N. Y. 28, 17 Am. Rep. 295, was a case of injury by a defective pier, and the court said: "Though the pier be private property, and though it be granted that the owner or occupant thereof might at any time close it and refuse entrance upon it to any and all persons, yet so long as it was kept open to that portion of the public of which the intestate was one, for the profit of defendant's lessees, there was upon such lessees, primarily, the duty of taking care, so long as it was thus kept open, that those who had lawful right to go there could do so without incurring danger to their persons."

But a further consideration of cases is neither needful nor useful. No case has been found, nor do I think can be, which supports the contention that, as to this plaintiff, the decayed back stairs of a private residence, under the circumstances proven, constituted a nuisance.

As there is no injury, in a legal sense, which can give a right of action, unless it is occasioned by a violation of some duty owing to the injured, there remains for consideration but one

other ground on which it is claimed that defendant's liability can be predicated.

It is urged that a recovery can be supported because the defendant negligently permitted the stairs to remain in an unsafe condition. The question is therefore presented, Did the defendant's duty require the exercise of any care to protect the plaintiff while on the premises?

The fact that a landlord leases premises with a condition that he may re-enter for the purpose of making repairs does not enlarge his responsibility as to third persons, or burden him with the duty as to them of observing any greater degree of care than would be required were he in possession.

As it may tend to avoid confusion, therefore, we will consider the question of negligence from the standpoint of actual occupation by the owner, this defendant.

It will be well to get in mind, first, the situation of the premises and the circumstances surrounding and leading up to the injury. For such purpose, we will take the testimony of the plaintiff.

At the time of the injury she occupied a house next to, and between four and five feet from, the house of defendant, where the injury occurred. Between the houses was a fence, and in the rear of the houses an opening had been made by knocking some boards off. Her little girls were accustomed to go into the yard and play, and on the 20th of June, 1886, about half-past five in the afternoon, plaintiff went over to bring the children home. They were then in the house, and as she was walking down the back steps holding one of them by the hand, the fourth or fifth step from the bottom broke and her foot went through, causing her to fall to the ground, resulting in injury.

From these facts it appears that the plaintiff was not brought within the risk of these unsafe steps by the occupier's invitation on a matter of common interest, or in the exercise of a right. She was therefore a mere licensee.

"Permission involves leave and license, but it gives no right. If I avail myself of permission to cross a man's land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right; it is an excuse or license, so that a party cannot be treated as a trespasser": Martin, B., in 7 Hurl. & N. 745. The general rule is, that a licensee must take the property as he finds it. Mr. Pollock, in his work on torts, states the rule as follows: "Persons who, by the mere

gratuitous permission of owners or occupiers, take a short cut across a waste piece of land, or pass over private bridges, or have the run of a building, cannot expect to find the land free from holes or ditches, or the bridges to be in safe repair, or the passages and stairs to be commodious and free from dangerous places." The exceptions to which he alludes need not be mentioned, for they are not in point here.

Mr. Pollock cites in support of the rule quoted English decisions mainly, but the same rule has been generally, if not universally, applied in the various jurisdictions in this country.

In *Savery v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514, a laborer employed in loading ice on board a vessel from the wharf, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway and broke his leg. Devereux, J., speaking for the court, said: "The distinction which exists between the obligation which is due by the owners of premises to a mere licensee, who enters thereon without any enticement or inducement, and to one who enters upon lawful business by the invitation, either expressed or implied, of the proprietor, is well settled. The former enters at his own risk; the latter has a right to believe that, taking reasonable care himself, all reasonable care has been used by the owner to protect him, in order that no injury may occur."

In *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 54 Am. Rep. 718, the plaintiff, an employee of defendant, quit work two days before the injury, on account of the supposed danger incident to the work at the pit where he was employed.

At the suggestion of the foreman of that pit, he applied at another pit and was engaged to commence work there on the following Monday, and while near a machine used in raising buckets of ore from the mines to the surface of the ground, a lever was thrown out of its socket, and flying around struck and broke his legs. It was held that he could not recover, the court saying: "He was on the premises at most by the mere implied sufferance or license of the defendant, and not on its invitation, express or implied, nor was he there in any proper sense on the business of the company. . . . The fact that the plaintiff had, on going to pit No. 10, engaged to commence work on the following Monday did not change his relation to the company, or make him other than a mere licensee on the premises."

That case is decisive of the one under consideration, so far as the question of negligence is concerned, for it is an authority for the assertion that plaintiff's own testimony establishes conclusively that while she was on defendant's premises she was at most a mere licensee.

The judgment should be affirmed.

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**LIABILITY OF LANDLORD FOR INJURIES SUSTAINED BY VISITOR OF HIS TENANT:** See note to *Nalley v. Hartford Carpet Co.*, 50 Am. Rep. 53-55.

**LIABILITY OF LANDLORD FOR NUISANCE** on his premises: See *Wunder v. McLean*, 134 Pa. St. 334; 19 Am. St. Rep. 702; *Timlin v. Standard Oil Co.*, 126 N. Y. 514; 22 Am. St. Rep. 845. When the premises are let with a nuisance on them, the landlord is bound to repair, and will be liable for injuries caused by defects in his buildings overhanging a street: *O'Connor v. Andrews*, 81 Tex. 28. See also *Delay v. Savage*, 145 Mass. 38; 1 Am. St. Rep. 429, with the note, which cites numerous cases as to the liability of landlords to third persons for defective condition or construction of premises.

**RIGHTS OF LICENSEES.** — One going on the premises of another without invitation is a bare licensee of the latter, and cannot recover for injury sustained by reason of a mere defect in such premises: *Cusick v. Adams*, 115 N. Y. 55; 12 Am. St. Rep. 772. Such licensee must at his peril use the ordinary means of ingress and egress: *Armstrong v. Medbury*, 67 Mich. 250; 11 Am. St. Rep. 585.

**PRIVITY OF CONTRACT.** — A party is not liable thereon to third persons not party thereto, and between whom and himself there is no privity of contract: *Rosman v. Townsend*, 17 Wis. 98; 84 Am. Dec. 733.

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## RUMSEY v. NEW YORK AND NEW ENGLAND R'y Co.

[133 NEW YORK, 79.]

**DAMAGES RECOVERABLE FOR CUTTING OFF ACCESS FROM PLAINTIFF'S LAND TO A RIVER** in front thereof cannot exceed the diminution of the rental or usable value of the property in the condition in which it was during the time for which recovery was sought. The plaintiff cannot recover for damages which he might have sustained if he had put the property to some other use or placed structures upon it.

**DAMAGES FOR CUTTING OFF ACCESS FROM PLAINTIFF'S LAND TO A RIVER IN FRONT THEREOF** may be ascertained by establishing the rental value with such access unaffected, and deducting therefrom the rental or usable value after such access was cut off.

**EVIDENCE.** — **IN AN ACTION TO RECOVER DAMAGES FOR CUTTING OFF PLAINTIFF'S LAND FROM ACCESS TO A RIVER**, in which he claims that its rental and usable value as a brick-yard has been diminished or destroyed, it is error to reject evidence offered by the defendant to show the additional cost of shipping brick, resulting from the acts complained of by the plaintiff.

**STARE DECISIS.** — The doctrine of *stare decisis* does not apply where it can be shown that the law has been misunderstood or misapplied, nor where

the former decision is evidently contrary to reason. Hasty or crude decisions should be examined without fear and reversed without reluctance.

**RIPARIAN OWNER WHOSE LANDS ARE BOUNDED BY A NAVIGABLE RIVER HAS A RIGHT TO ACCESS** to such river, and to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public.

**RIPARIAN OWNER, WHEN A RAILWAY IS CONSTRUCTED ACROSS HIS WATER-FRONT**, along a public river, depriving him of access to the navigable part of the stream, is entitled to recover compensation for the injury to his property sustained by him thereby, though such railway was constructed in pursuance of a grant from the legislature.

*W. C. Anthony*, for the appellant.

*H. H. Hustis*, for the respondents.

**O'BRIEN, J.** This appeal involves two important questions:

1. The rule of damages applicable generally to such cases; and 2. The right of the plaintiffs to recover anything for the period prior to March 3, 1885. The plaintiffs are, and for more than twenty years have been, the owners of about forty acres of land on the east bank of the Hudson River at Fishkill, bounded on the west by the river, and covering about one thousand feet of the river front. It also appears that on the 3d of March, 1885, the state, pursuant to a resolution of the commissioners of the land-office, granted to the plaintiffs the lands under water adjacent to and in front of the uplands, from high-water mark westerly to the channel bank of the river, excepting therefrom the rights of the New York Central and Hudson River Railroad Company. This railroad, it seems, was constructed across the water-front prior to and about the year 1854, and since that time the plaintiffs and their grantors have used a strip of land leading from the uplands through a culvert under the Hudson River railroad to the channel of the river, for loading vessels with brick made on the premises, and for all purposes connected with the manufacture of brick on the premises, with the consent of the Hudson River railroad, until such use was obstructed by the building of the defendant's road-bed. This was built in the years 1880 and 1881, outside of and nearly parallel with the road-bed of the Hudson River road, in front of the culvert above described, and along the whole river front of plaintiffs' land, without any right or authority from the plaintiffs or their grantors. The effect of this was to cut off the plaintiffs from access to the river from their lands. The plaintiffs' title to the uplands and the lands



under water, where the defendant's road is built, has been determined in their favor by the decisions of this court: *Rumsey v. New York etc. R. R. Co.*, 114 N. Y. 423; 125 N. Y. 681.

The principles applicable to actions of an equitable character, to restrain the operation and maintenance of such structures, when the facts amount to a continuing trespass against the rights of adjacent property owners, are not involved, as the plaintiffs have not adopted that form of obtaining relief: *Galway v. Metropolitan E. Ry Co.*, 128 N. Y. 132; *Uline v. New York C. & H. R. R. Co.*, 101 N. Y. 98; 53 Am. Rep. 123; 54 Am. Rep. 661.

In this action the plaintiffs seek to recover damages to their uplands, sustained by the act of the defendant in constructing its road-bed across the plaintiffs' water-front, and thereby cutting off their access to the river, and such damages are claimed from the time of the construction of the railroad to the commencement of the action. The court assessed the damages at \$10,500. This result was reached upon the theory that the use of the plaintiffs' premises for the purpose of a brick-yard had been depreciated to that extent in consequence of the construction of the defendant's road. At the same time the court found that the culvert, as a passageway, was discontinued about the year 1875, and the dock at the westerly end of the culvert was allowed to go to decay, as was also the causeway which connected the dock with the brick-yard. That the plaintiffs' lands had no buildings or machinery on them to fit them for use for brick-making purposes, and that they had been in this situation since the year 1875, and that the defendant had in no wise injured the plaintiffs' lands, except only to prevent or delay the sale of the clay thereon for brick-making purposes. It appears, therefore, from these findings, that the use of the premises for brick-making or as a brick-yard had been discontinued six years before the defendant's road was built. The plaintiffs asked to recover in this action only such damages as they have sustained up to the commencement of the action, by reason of the acts complained of. As a basis for the estimate, the land must be taken as it was used during the time embraced in the action. It does not appear that the use of the premises as a brick-yard was discontinued in consequence of the acts of the defendant, and that fact could not well be established, for it ceased to be used for such purpose long before the defendant's road was built. The proper measure of damages in such a case is the diminished rental or

usable value of the property as it was, in consequence of the loss by defendant's acts of access to the river, in the manner enjoyed by the owner prior to the construction of the embankment across the water-front by the defendant. The plaintiffs cannot be permitted to prove or allowed to recover damages that they might have sustained if they had put the property to some other use or placed other structures upon it: *Tallman v. Metropolitan Elevated R. R. Co.*, 121 N. Y. 119.

The damages could not be based upon the rental or usable value of the property for a brick-yard, any more than they could be based upon their use for some other specific or particular purpose to which they were not in fact put by the owners. The question is, What damages did the plaintiffs in fact suffer by having the access to the river cut off? not what they might have suffered had the land been devoted to some particular use to which it was not put.

The proof of damages on the part of plaintiffs consisted entirely of the opinions of witnesses as to the rental value of the land in the absence of the structure built by defendant. This proof was competent as far as it went, but it did not establish the legal measure of damages. It should also have been shown what was the rental or usable value of the premises as they were with the obstruction which interfered with the access to the river, as the difference in these two sums represented the actual loss caused by the defendant. The defendant offered to prove the additional cost of shipping brick to market upon the river, rendered necessary by the construction of the embankment. This testimony was objected to by the plaintiffs and excluded by the court, to which the defendant excepted. This ruling was erroneous. The additional expense caused by the defendant's structure in the river of transporting brick, or any other product of the land, to market was an important element of the damages sustained, and the defendant should have been permitted to prove the fact in that regard, at least by way of answer to plaintiffs' theory of damages. The method adopted of establishing the plaintiffs' damages, therefore, demands a reversal of the judgment.

The plaintiffs were permitted to recover for more than four years prior to their grant of the land under water on the 3d of March, 1885. During this period the plaintiffs' rights were those of ordinary riparian owners on the banks of navigable rivers. They owned the uplands bounded by the river, and as such owners had the right, under the statute, to apply to

the commissioners of the land-office for a grant of the land under water in front of their premises. In this respect and on this branch of the case, the facts are identical with those in the case of *Gould v. Hudson Riv. R. R. Co.*, 6 N. Y. 522.

If that case is to be followed, the plaintiffs cannot recover any damages prior to March 3, 1885. It was there held that the owner of lands on the Hudson river has no private right or property in the waters or the shore between high and low water mark, and therefore is not entitled to compensation from a railroad company which, in pursuance of a grant from the legislature, constructs a railroad along the shore, between high and low water mark, so as to cut off all communications between the land and the river otherwise than across the railroad. It is believed that this proposition is not supported by any other judicial decision in this state, and if we were dealing with the question now as an original one, it would not be difficult to show that the judgment in that case was a departure from precedent and contrary to reason and justice. It is no doubt true that even a single adjudication of this court, upon a question properly before it, is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of *stare decisis*, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. Chancellor Kent, commenting upon the rule of *stare decisis*, said that more than a thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubted, or limited in their application. He added, that "it is probable that the records of many of the courts of this country are replete with hasty and crude decisions; and in such cases ought to be examined without fear and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error": 1 Kent's Com., 13th ed., 477; Broom's Legal Maxims, 153; *Gifford v. Livingston*, 2 Denio, 392; *Morse v. Gould*, 11 N. Y. 281; 62 Am. Dec. 103; *Judson v. Gray*, 11 N. Y. 408.

The Gould case has been frequently criticised and questioned,

and it is believed has never been fully acquiesced in by the courts or the profession as a decisive authority, or a correct exposition of the law respecting the rights of riparian owners: *Kane v. New York E. R. R. Co.*, 125 N. Y. 184. The learned judge who gave the prevailing opinion in the case assumed, as the foundation of his argument, that the question was conclusively determined by the supreme court adverse to the plaintiff in *Lansing v. Smith*, 8 Cow. 146, subsequently affirmed in the court of errors: 4 Wend. 9; 21 Am. Dec. 89. That case grew out of the construction of the canal basin at Albany, a public improvement to promote commerce and navigation; and the question was, whether, as against such an improvement, the plaintiff's right to the use of his dock and water-front, as he had enjoyed it before, was exclusive. It may be conceded that the sovereign power in a work for the improvement of the navigation of a public river may incidentally interfere with the enjoyment and use of the water-front by riparian owners, but the power to grant a private individual or corporation the right to cut such owner off entirely from communication with the stream, without compensation, is quite another and different question. There is really no authority in *Lansing v. Smith*, 8 Cow. 146, for the support of such a proposition. On the contrary, as was pointed out by Judge Andrews in the *Kane* case, *supra*, that question was excluded from the discussion, as the chancellor who delivered the opinion was careful to say: "Whether the legislature could grant the right to any other person to build a wharf in front of the plaintiff's, so as to destroy his entirely, is a question which it is not necessary now to discuss." It is not necessary to refer at much length to the numerous cases and the abundant learning to be found in the books respecting the rights of riparian owners. The authorities on the general subject are not at all in harmony, and we are now concerned with but a single branch of an important and somewhat complicated subject, namely, the right of such owner, as against some other private interest, to have access to and enjoy the use of the highway.

It may be observed, however, that since the decision of the Gould case in 1852, this question and questions of a kindred nature have been elaborately examined, discussed, and settled in this court, in our highest federal tribunal, in the court of last resort in England, and in the highest court of several of our sister states. The doctrine of that case has been repudiated or ignored in these decisions, and the rights of the propri-

etors of lands upon rivers and public highways determined upon principles more in accord with reason and justice. The long line of decisions in this court, from the case of *Story v. New York El. R. R. Co.*, 90 N. Y. 122, 48 Am. Rep. 146, to the case of *Kane v. New York El. R. R. Co.*, 125 N. Y. 164, hold that an owner of land abutting upon a public street has a property right in such street for the purposes of access, light, and air, and that the state has no power to grant to a railroad the right to occupy the street when such occupation injuriously affects the enjoyment by the property owner of such rights, except by the exercise of the power of eminent domain, and when a street is thus used by the railroad, without condemnation proceedings or a grant from the property owner, it is responsible to him for any damages resulting therefrom. Unless there is some distinction to be made between the rights which pertain to an owner of land upon a public river and one upon a public street, which is not perceived, then the principles sanctioned by this court in these cases virtually overrule the *Gould case*, as they are apparently irreconcilable.

The question respecting the rights of riparian owners in such a case was determined in the supreme court of the United States in *Yates v. Milwaukee*, 10 Wall. 497.

Mr. Justice Miller, in delivering the opinion of the court, stated the law clearly as determined by that court: "But whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to all the rights of a riparian proprietor whose land is bounded by a navigable stream, and among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever these may be. . . . This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good upon due compensation": *St. Louis v. Rutz*, 138 U. S. 246.

In England it was held quite recently that the owner of an estate on the tide-waters of the Thames was entitled to compensation, not only for the land actually taken under the

authority of a statute for the construction of a public road along the shore, which cut off the owner's access to the river, but also for the permanent damage to the whole estate in consequence of its change by the improvement from river-side to roadside property, including his individual and particular right to use the shore of the river: *Buckleuch v. Metropolitan Board of Works*, L. R. 5 E. & I. App. 418.

In nearly all of our sister states where the question has arisen, the same or substantially similar rules have been adopted: *Ashby v. Eastern R. R. Co.*, 5 Met. 368; 38 Am. Dec. 426; *Providence Steam-engine Co. v. Providence etc. Steamship Co.*, 12 R. I. 348; 34 Am. Rep. 652; *Chapman v. Oshkosh etc. R. R. Co.*, 33 Wis. 629; *Delaplaine v. Chicago etc. R'y Co.*, 42 Wis. 214; 24 Am. Rep. 386; *Holton v. Milwaukee*, 31 Wis. 38; *Brisbane v. St. Paul & S. C. R. R. Co.*, 23 Minn. 114.

The case of *Stevens v. Patterson & N. R. R. Co.*, 34 N. J. L. 532, 3 Am. Rep. 269, in which a contrary rule was adopted, was decided largely upon the authority of the Gould case, and that of *Buckleuch v. Metropolitan Board of Works*, L. R. 5 Exch. 221, which, as we have seen, was subsequently reversed in the house of lords: Gould on Waters, sec. 151.

It must now, we think, be regarded as the law in this state that an owner of land on a public river is entitled to such damages as he may have sustained against a railroad company that constructs its road across his water-front, and deprives him of access to the navigable part of the stream, unless the owner has granted the right, or it has been obtained by the power of eminent domain. This principle cannot, of course, be extended so as to interfere with the right of the state to improve the navigation of the river, or with the power of Congress to regulate commerce under the provisions of the federal constitution. The plaintiffs were therefore entitled to recover such damages as they could prove to have been sustained by them prior to March 3, 1885, but on account of the erroneous rules adopted for determining the damages above pointed out, the judgment should be reversed and a new trial granted, costs to abide the event.

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**RIPARIAN OWNER'S RIGHT OF ACCESS TO THE WATER:** See cases cited in the note to *Miller v. Mendenhall*, 19 Am. St. Rep. 231. That right is one "of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it should be taken for the public good, upon due compensation": *Yates v. Milwaukee*, 10 Wall. 497.

**RIGHT OF RIPARIAN OWNER TO BUILD WHARVES:** See note to *Miller v. Mendenhall*, 19 Am. St. Rep. 231, 232. That right cannot be taken away, or its value lessened or impaired, even for public use, without compensation, or without due process of law, and it cannot be taken at all for any private use: *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123.

**EMINENT DOMAIN—PUBLIC USE.**—In taking property under power of eminent domain for railroad purposes, it is none the less a taking for or on behalf of the state, because it may be done in the name of a corporation: *Little Rock etc. R. R. Co. v. Woodruff*, 49 Ark. 381; 4 Am. St. Rep. 51. In order to make the use public, a duty must devolve upon the person or corporation to furnish the public with the use intended: *Pocantico Water etc. Co. v. Bird*, 130 N. Y. 249. The question of public use is a judicial one, and must be determined by the courts: *Pocantico Water etc. Co. v. Bird*, 130 N. Y. 249. The courts are not concluded by any declaration of the law-making power: *Waterloo etc. Mfg. Co. v. Shanahan*, 128 N. Y. 345. Nor can the legislature authorize a public use, which will deprive the owner of adjoining property of its beneficial use without allowing compensation: *Bloodgood v. Mahant etc. R. R. Co.*, 18 Wend. 9; 31 Am. Dec. 313.

**STARE DECISE.**—See note to *Gee v. Williamson*, 27 Am. Dec. 631-635; and *Gould v. Sternburg*, 15 Am. St. Rep. 142. Courts will not depart from decisions recognized by subsequent cases, and which have become a rule of property, even though a different conclusion might have been reached if the question were an original one: *Field v. Goldsby*, 28 Ala. 218; 65 Am. Dec. 341. But a solitary decision of recent date has never been held to change the law in any case. Especially should it not have that effect where to adhere to it would be fraught with far greater injustice than could possibly arise from overruling it: *Frink v. Darst*, 14 Ill. 304; 58 Am. Dec. 575.

**COMPENSATION TO LAND-OWNER.**—The rule laid down in *Spring Valley Water etc. Co. v. Drinkhouse*, 92 Cal. 528, is, that in estimating the market value of property taken for a public use, the purpose for which it is most valuable may be considered. This rule seems much too sweeping for universal application, and is certainly opposed to the doctrine of the principal case, unless intended to be largely qualified by reference to the special circumstances under review. The rate of valuation is not what the property is worth for some particular purpose: *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169; 98 Am. Dec. 96. The owner is to be compensated for the deprivation of any existing value: *Currie v. Waverly etc. R. R. Co.*, 52 N. J. L. 381; 19 Am. St. Rep. 452, and note. The compensation is to be estimated with respect to the time at which the proceedings are commenced, not the time at which the land was entered: *Driever v. Western Union R. R. Co.*, 32 Wis. 569; 14 Am. Rep. 726. See also the extended note to *Winona etc. R. R. Co. v. Waldron*, 88 Am. Dec. 113-121.

# **MAYOR v. DRY DOCK, EAST BROADWAY, AND BATTERY RAILROAD COMPANY.**

[123 NEW YORK, 104.]

**CORPORATION ACCEPTING A CHARTER** consents to be bound by all of its provisions and conditions, and cannot complain of the enforcement of any, if, by a fair reading of the language, the enforcement in the particular manner is authorized.

**CORPORATIONS — CONSTRUCTION OF CHARTER AND ORDINANCES CONCERNING.**

— If the charter of a street-railway corporation directs its cars to be run as often as the convenience of the passengers may require, and to be subject to such reasonable rules and regulations in respect thereto as the common council may by ordinance prescribe, the stipulation that cars shall be run as often as the convenience of passengers may require may be considered as bearing upon and illustrating the design of the legislature.

**MUNICIPAL CORPORATIONS. — THE PRESUMPTION IS IN FAVOR OF THE REASONABLENESS OF A MUNICIPAL ORDINANCE,** and the burden of proof must be assumed by one who resists it as unreasonable. In the passage of a general ordinance affecting subjects of municipal administration, it will be presumed that the common council acted in the exercise of judgment upon the facts, and for reasons calling for such legislative action.

**MUNICIPAL CORPORATIONS. — THE ADOPTION OF AN ORDINANCE, THOUGH PRESUMPTIVE, IS NOT CONCLUSIVE EVIDENCE OF ITS REASONABLENESS,** and any person affected by it may rebut this presumption by giving in evidence facts showing that in his case its enforcement would be unreasonable.

**MUNICIPAL CORPORATIONS. — ORDINANCE REQUIRING STREET-RAILWAYS TO RUN NOT LESS THAN ONE CAR EVERY TWENTY MINUTES** between the hours of twelve o'clock, midnight, and six o'clock, A. M., while presumed to be reasonable, may be avoided by proof that the convenience of passengers did not require the running of cars during the hours specified, when the charter of the corporation stipulates that it shall run cars as often as the convenience of passengers may require, and be subject to such reasonable rules and regulations in respect thereto as the common council may prescribe. Evidence that cars were run in compliance with the ordinance, and were generally not patronized, often not carrying a single passenger, tends to prove that the convenience of passengers did not require cars to be run during the hours specified, and therefore that the ordinance was unreasonable.

**MUNICIPAL CORPORATIONS. — ORDINANCE REQUIRING A STREET-RAILWAY TO RUN ITS CARS DURING CERTAIN HOURS OF THE NIGHT** is not complied with by operating one branch of its lines only, leaving a parallel branch not in operation.

*John M. Scribner*, for the appellant.

*D. J. Dean*, for the respondent.

**GRAY, J.** This was an action to recover a penalty of one hundred dollars for an alleged violation by the railroad company of an ordinance of the common council of the city of New



York, which required the several street surface railroad companies to operate their roads "as frequently as public convenience may require, and not less than one car every twenty minutes between the hours of twelve, midnight, and six o'clock, A. M., each and every day, both ways, for the transportation of passengers."

The particular violation charged in the complaint was the failure of defendant to run its cars on its Avenue D branch every twenty minutes during the ordinance hours, on the eleventh day of July, 1890. The plaintiff recovered a judgment in the fifth judicial district court in the city of New York, which was affirmed upon an appeal to the general term of the common pleas court for the said city. The defendant obtained leave to take an appeal to this court, and its counsel has presented an elaborate argument, in which he questions the right of the common council to pass the ordinance as to this defendant, and he insists that in the trial of the action the judge erred in the exclusion of evidence, and in his decision upon the case as made.

In 1860 the legislature passed "An act to authorize the construction of a railroad in Avenue D, East Broadway, and other streets and avenues of the city of New York": Laws 1860, c. 512. This defendant is the assignee and owner of the rights, privileges, and franchises conferred on the grantees named in the act. In its second section it was provided as follows:—

"Sec. 2. Said railroad shall be constructed on the most approved plan for the construction of city railroads, and shall be run as often as the convenience of passengers may require and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of New York may from time to time by ordinance prescribe."

In 1890 the ordinance in question was passed by the common council, and the defendant questions its power and right to pass it, upon the ground that it alters or violates the contract between the state and the defendant. The argument, however, disregards the fundamental fact that it was a part of that contract that the defendant should be subject to such rules and regulations as the common council should prescribe, and the only limitation or qualification imposed by the legislature in that respect was, that they should be such as were reasonable.

Within the boundaries of the authority conferred by the legislature upon the common council, that body may make

ordinances for the regulation of the conduct of the affairs of individuals or corporations, or of the use of their privileges, where they touch or affect municipal and public interests. This right to legislate through ordinances, in the administration of municipal affairs, is necessary for the protection and for the promotion of civic interests, and is conferred in the consolidation act. That body has, of course, no general power in these respects. It may exercise only such powers as have been especially delegated to it by the legislature; and such as may be necessary to carry into effect any and all the powers vested in the municipal corporation.

When the charter under which the defendant acquired its right to operate its railways was granted, in 1860, it was one of its conditions or provisions, and as such quite as much obligatory upon the grantees as any other part of the legislative grant, that the corporation should comply with any ordinances prescribed by the common council; which constituted a reasonable regulation of the use of the corporate franchises. There is not here any question of an alteration of a charter, or of any impairment of the contract with the state. The defendant took the charter with all the conditions expressed in it, and, by acceptance, has agreed that the operation and enjoyment of the privileges and franchises conferred shall be in subordination to such reasonable regulations as the common council of the city shall ordain. By accepting the charter, the grantees voluntarily consented to be bound by all of its provisions and conditions, and the corporation cannot complain of the enforcement of any, if, by a fair reading of the language, the enforcement in the particular manner is authorized. The question, then, simply is, whether this ordinance of the common council, which was adopted with respect to all the surface roads in the city, was a reasonable regulation with respect to this defendant; for if it was not, then it is not obligatory within the meaning of the act of incorporation. The authority of the common council in prescribing regulations was qualified as to this defendant, and when it is sought to recover a penalty for non-compliance with a regulation, it is competent for the defendant to show that it should not apply to it, because unreasonable. As in this case the regulation affects the running of cars at stated intervals of time, its reasonableness, I think, may properly be considered in connection with the other language of the second section of the charter, which requires the corporation to "run as often as the

convenience of passengers may require." Not that that language controls or decides the question of reasonableness, but it bears upon and illustrates the design of the legislature in subjecting the corporation to regulations upon that subject. In the passage of the ordinance in question, the presumption is in favor of its reasonableness, and the burden was upon the defendant to show the contrary. I think this is very obviously so, because the common council acts as the public or municipal agent, and exercises an authority which was delegated to it by the legislature as being the proper and representative body to make rules and regulations to which the railroad company should be subject. In the passage of a general ordinance affecting subjects of municipal administration, it should and will be presumed that the common council acted in the exercise of a judgment upon facts, and for reasons calling for such legislative action. In *Cronin v. People*, 82 N. Y. 323, 37 Am. Rep. 564, it was said of the city ordinance there, that it was not "necessary to allege or explain the reasons for its enactment, or the exigency out of which it grew. It is of the nature of legislative bodies to judge for themselves, and the fact and the exercise of that judgment are to be implied from the law itself."

The adoption of the ordinance in question does not conclude the courts in passing upon the case of its alleged violation, because their determination is to be controlled by the question of whether it was reasonable as to the defendant, and that can only be determined from facts in evidence. The court will imply the existence of reasons rendering the adoption of such a public measure presumptively proper, and it is for the defendant to show the facts which should exempt it from compliance with the general regulation. Presumptively, the ordinance was required in the interests of the public, for whose convenience railroad companies hold and must operate their franchises; but the presumption is open to rebuttal by this defendant by giving in evidence facts which show that in its case its enforcement would be unreasonable, and that the convenience of the public or of passengers did not require such a regulation. It was, therefore, competent for this defendant upon the trial to give evidence of such facts as would establish, or tend to establish, that the convenience of passengers or of the public did not require the running of its cars during the ordinance hours specified. Such facts were plainly relevant to the issue, and bore upon the question of the reason-

ableness of the ordinance in the defendant's case. Undoubtedly the reasonableness of the ordinance was a question of law for the court to decide upon a consideration of all the facts and circumstances of the case. It is the province of courts to construe the acts of legislative bodies, and within that jurisdiction, in a proper case, to apply and to enforce their provisions. When the law is positive and plain in its terms and requirements, and if it does not conflict with any constitutional rights or immunities, then that strict compliance must be enforced which a fair reading demands, and construction may have little or no work to perform.

But if limitations are affixed to the law which control in its application to subjects, it is for the court to decide whether, under the circumstances as disclosed, the conditions for its application are met by the case. Whether this ordinance should apply to the defendant would depend upon whether the defendant has succeeded in proving that it was an unreasonable regulation in its particular case. If it could prove that when obeying the ordinance, upon a fair trial of the regulation, few or no passengers were carried, the judge might and possibly should find that the regulation was an unreasonable one, and therefore should not be enforced. With the evidence upon the subject before him, it would be for the judge to decide upon the question of the reasonableness of enforcing such an ordinance.

That the evidence offered related to a period of time subsequent to the date when the ordinance went into effect is not a ground for objection. Obviously, until after the defendant did commence to operate this branch of its road in obedience to the ordinance, it would be difficult to show that passengers did not use defendant's road during the ordinance hours, and that public convenience did not require the running of cars all night. Nor is the question controlled by considerations of the expense to the defendant. It received its franchises and privileges for the public convenience, and to be operated as the public interests should require. No provision or condition of the law of its being qualified its obligation to use its franchises, by permitting the operation of the railroad to be controlled solely by questions of profits. In the case of such *quasi* public corporations, their primary duty, and a cardinal obligation which arises from the grant of public rights and privileges, require of them that they should operate their franchises in a reasonable subservience to the public convenience. In the

present case it would not be a sufficient answer to the rule to say that the operation of cars all night was unprofitable. The objection should be upon the ground that the convenience of passengers does not require it.

We think that there was no force in the objection, and no basis for it in the facts, that the ordinance was unreasonable for the want of sufficient time within which to comply with its requirements; and we do not think that it was a sufficient compliance by the defendant to operate its Avenue B line of cars. The ordinance related to all lines of railroads using the streets of the city, whether they were main lines or branches.

For the error committed in excluding evidence offered by the defendant to show that, with respect to the running of its cars over the Avenue D branch, the regulation embodied in the ordinance of the common council was not a reasonable one, the judgment below should be reversed and a new trial ordered, with costs to the appellant to abide the event.

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CHARTER OF INCORPORATION IS A CONTRACT between the government and the corporators: *Bailey v. Philadelphia etc. R. R. Co.*, 4 Har. (Del.) 389; 44 Am. Dec. 593; *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625. And a railroad company, though it does not submit itself to the ordinances of a city on entering it, is nevertheless subject thereto: *City etc. R'y Co. v. Mayor*, 77 Ga. 731; 4 Am. St. Rep. 106.

UNREASONABLE ORDINANCES: See note to *Ward v. Mayor etc.*, 35 Am. Rep. 702, 703. The presumption is, that an ordinance is reasonable, and the burden is upon the party who denies its validity: *State v. Trenton*, 53 N. J. L. 132.

REQUISITES OF VALID ORDINANCE. — City ordinance, to be reasonable, must tend in some degree to the accomplishment of object for which the corporation was created and the powers conferred: *People v. Armstrong*, 73 Mich. 288; 16 Am. St. Rep. 578. It must be in harmony with the general laws, and not repugnant to recognized principles of legal and equal rights: *Matter of Frases*, 63 Mich. 396; 6 Am. St. Rep. 310; *Anderson v. Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175.

ORDINANCES REGULATING RAILWAYS RUNNING THROUGH STREETS. — The power to enact regulations of speed of cars and trains on railways may be delegated to cities and towns: *Grube v. Missouri P. R'y Co.*, 98 Mo. 330; 14 Am. St. Rep. 645; and that power may be reasonably exercised: *Grube v. Missouri P. R'y Co.*, 98 Mo. 330; 14 Am. St. Rep. 645. Ordinances requiring a railway corporation to keep a flagman to give warning to travelers at the crossing of a railway track on a designated street is a valid local law: *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305; 10 Am. St. Rep. 136.

REGULATION OF TRADES, OCCUPATIONS, ETC.: See notes to *Robinson v. Mayor etc.*, 34 Am. Dec. 638-640; *Ex parte Gregory*, 54 Am. Rep. 528. Apparently municipal corporations cannot prescribe the hours of the day during which an occupation is to be carried on except in those cases in which

the ordinance is fairly justifiable in an exercise of the police power. Thus it is lawful to prohibit restaurants to keep open after ten o'clock: *State v. Freeman*, 38 N. H. 426; or to appoint the times at which a market is to be kept open: *Jacksonville v. Leckwith*, 26 Fla. 163; 23 Am. St. Rep. 558.

THE POWER OF MUNICIPAL CORPORATIONS TO PASS ORDINANCES is the subject of a note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 627-643.

## COLE v. MILLERTON IRON COMPANY.

(133 NEW YORK, 164.)

**FRAUDULENT TRANSFERS — CORPORATIONS.** — TRANSFER BY A CORPORATION OF ALL ITS ASSETS, made and accepted for the purpose of suspending and terminating its regular business and rendering it incapable of performing further corporate duties, is illegal as against creditors whose rights are thereby sacrificed and their remedies destroyed, and they may set aside such transfer in so far as it bars their remedy.

**CORPORATIONS. — CREDITORS OF A CORPORATION HAVE AN EQUITABLE LIEN UPON ITS ASSETS**, both as against stockholders and all transferees except those purchasing in good faith and for value, and a transferee who accepts an assignment of all the assets of a corporation, in consideration of his agreement to assume the payment of its debts, is not such a purchaser.

**CREDITORS CANNOT BE FORCED TO SUBMIT TO A CHANGE OF DEBTORS**, and therefore a transfer of one corporation to another, in consideration of the latter's assumption of the debts of the former, is illegal as against its creditor, and cannot be upheld as against him on the ground that the stockholders and officers of the two corporations are the same, and his remedy against the transferee is as ample as it would have been against the transferor had no transfer been made.

**INSOLVENCY. — TRANSFER BY A CORPORATION IS IN CONTEMPLATION OF INSOLVENCY**, though it had never refused payment of any of its obligations, if the transfer is of all its assets in consideration of an agreement of the transferee to assume the payment of its debts, and the necessary result of the transfer was to render the corporation unable to make such payment itself.

*Thomas Thacher*, for the appellants.

*C. B. Herrick*, for the respondent.

**FINCH, J.** The plaintiff is a creditor of the National Mining Company, a corporation formed and existing under the laws of this state. He commenced an action to recover damages done to his property by the wrongful act of the corporation, serving the summons in October, 1887, and recovering judgment in July of the next year. During the pendency of the action all the property and assets of the debtor corporation were transferred to the Millerton Iron Company, also a domestic corporation, upon a nominal consideration, except an

assumption by the vendee of the debts of the vendor, and thereupon the former executed a mortgage to the Mercantile Trust Company, covering all its property, including that acquired from the National Mining Company. When the plaintiff obtained his judgment, nothing remained upon which it was a lien, and his execution was returned unsatisfied. He then began this action, in which he assailed the transfers made, with a view of subjecting the property of the debtor corporation to the satisfaction of his debt. Upon the trial his complaint was dismissed, but the general term reversed the judgment and ordered a new trial. From that order the trust company alone appeals, and has given the usual stipulation for judgment absolute.

The trial court has refused to find that the National company was insolvent at the date of its transfer, but did find that such transfer suspended and terminated the regular business of the grantor, and was made and accepted with that purpose and intention. The practical effect was to dissolve the grantor corporation, and subject its charter to forfeiture at the hands of the state, for it voluntarily stripped itself of all its property and assets, and became incapable, and intended to be and remain incapable, of performing its corporate duties. Such a transfer, which involves the destruction of the corporation and an abandonment of the purposes of its organization, is illegal as against creditors whose rights are thereby sacrificed and their remedies destroyed. The transfer was illegal, also, because made in contemplation of insolvency. Those who accomplished it knew that its necessary and inevitable effect would be to make the corporation unable to pay its debts, and must be held to have intended that consequence of their acts. I do not agree to that reading of the statute which limits its prohibition to cases in which payment of some note or obligation has been previously refused. An interpretation so narrow would seriously maim and distort the obvious purpose of the statute, and make a transfer, in contemplation of insolvency, good the day before a note matured and bad the day after. As against the creditor the transfer to the Millerton company was illegal and in fraud of his rights. The assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against the stockholders and all transferees, except those purchasing in good faith and for value: *Bartlett v. Drew*, 57 N. Y. 587; *Brum v. Merchants' Mut. Ins. Co.*, 16 Fed. Rep. 143; *Morawetz on*

Corporations, sec. 791. The Millerton company was not such a purchaser. It parted with nothing. It knew and participated in the illegal purpose to destroy the National company, to make it utterly insolvent, and to deprive its creditors of the trust fund upon which they had a right to rely, and so they were at liberty to set aside the transfer so far as it barred their remedy, and to enforce their equitable lien upon the property in the hands of the transferee.

It is not a sufficient answer to say that the transfer was rather formal than real, because before its occurrence the Millerton company, having the same stockholders and officers, managed and conducted the business of the National company before the transfer, as well as after, and that what occurred was a practical consolidation. Companies may consolidate, but under the permission and safe-guards of the statute, all of which were disregarded, and what is called the formal transaction cuts off and destroys the right of the creditor, and is being used for that exact purpose.

Neither is it an answer to say that the creditor is not harmed by a change of the party liable to pay, unless there be some disproportion in the assets. He cannot be forced to change his debtor against his will, and it appears in the proof that the transfer to the Millerton company was followed by a mortgage sweeping in to its lien and peril the very property transferred.

We are satisfied, therefore, that the plaintiff was entitled to judgment of sequestration and for a receiver, and so the order of the general term was right. The judgment obtained by Chapman is not a bar to the remedy. It is not relied upon for that purpose, and the appointment of the receiver was without notice to the attorney-general as the law required: Laws 1883, c. 378. In the present case the plaintiff must give such notice when he applies for the appointment.

The rights of the mortgagee, who is the present appellant, need not now be accurately determined. Whether that mortgage was valid at all for want of proper consents, or whether any of the bond-holders have acquired equities superior to those of the plaintiff, may or may not become questions in the future. Enough appears to show that some of them do not stand in the attitude of *bona fide* creditors, and that the remedies of all may be confined to the property of the Millerton company not derived from the National until at least the former is



exhausted. Those questions, however, may be left to the developments consequent upon further proceedings.

The order of the general term should be affirmed, and judgment absolute for the plaintiff be rendered upon the stipulation, with costs.

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**FORFEITURE OF CORPORATE FRANCHISES:** See note to *State v. Atchinson &c. R. R. Co.*, 8 Am. St. Rep. 179-202, and especially 190, as to forfeiture by abandoning business.

**DISSOLUTION OF CORPORATION** does not take away or destroy its property or annul its contracts: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684, and extended note, showing the authority for the doctrine that the property of a dissolved corporation is a trust fund for the payment of its creditors; *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192.

**VOLUNTARY CONVEYANCES, WHEN FRAUDULENT:** See extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739-754. Innocent grantees for valuable consideration under a conveyance, fraudulent as to creditors, will be protected against the claims of the latter: *Lyons v. Leahy*, 15 Or. 8; 3 Am. St. Rep. 133; *Tuteur v. Chase*, 66 Miss. 476; 14 Am. St. Rep. 577. But a grantee with knowledge of the fraud is not a *bona fide* purchaser, notwithstanding the fact that his only motive was to secure the payment of his own debts: *Garland v. Rices*, 4 Rand. 282; 15 Am. Dec. 758. And where one purchases property from a debtor whom he knows to be insolvent, with notice that his object in selling it was to deprive his creditors of their recourse upon it, the sale will be annulled: *Chaffe v. Gill*, 43 La. Ann. 1054. A vendee, without notice of the fraud at the time of the sale, but obtaining knowledge of the fraud after making partial payments, will be protected only to the extent of such partial payments: *Work v. Coverdale*, 47 Kan. 307. So where a creditor, with knowledge of the insolvency of a firm, buys its property for a sum greater than his debt, and gives his note for the surplus, the sale is fraudulent as to creditors: *Segar v. Thomas*, 107 Mo. 635. But if the value of the property is not in excess of the debt, the conveyance will be sustained: *Morrison v. Morris*, 85 Ala. 196. So where a father, who was insolvent, conveyed his land to his three sons, upon consideration that they discharge certain of his debts amounting to the full value of the land, which they in good faith did, the conveyance will not be held fraudulent as against other creditors whose debts the sons did not agree to assume: *Nichols v. Ellis*, 98 Mo. 344.

**SUBSTITUTION OF DEBTORS.**—The principle that creditors cannot be forced to submit to a change of debtors is frequently applied to cases where the *personnel* of a firm is changed, or one firm transfers its business to another, the new firm assuming the debt of the old. The original debtors are not discharged without an express agreement to that effect: *Carriere v. Labiche*, 14 La. Ann. 211; 74 Am. Dec. 428. But assumption by a partnership of a debt of one of its members is not a fraud upon the partnership creditors if the firm is solvent and able to pay its other debts at the time: *Hage v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422.

## ASHTON v. CITY OF ROCHESTER.

[183 New York, 187.]

**JUDGMENTS — PARTIES.** — A judgment of a court of competent jurisdiction sometimes operates as an estoppel against persons who were not named in the proceedings and were not parties to the record by name. It is enough that they were represented in the action or proceeding which resulted in the judgment, or were entitled to be heard therein.

**JUDGMENTS AGAINST MUNICIPAL CORPORATIONS OR THEIR OFFICERS.** — When a judgment is rendered against a county, city, or town in its corporate name, or against a board or officer who represents the municipality, in the absence of fraud or collusion, it will bind the citizens and tax-payers, because they are represented in the litigation by agencies authorized to speak for them and to protect their interests.

**JUDGMENT AGAINST THE PROPER OFFICERS OF A MUNICIPAL CORPORATION,** directing a writ of mandate to issue, requiring them to award a contract for the improvement of a public street, is conclusive against the owners of property liable for such improvement, though they are not parties to the record that such officers had authority to contract for the execution of the work; and therefore an assessment levied after the contract had been let and the work done will not be enjoined at a suit of the property owners, though but for such suit it would appear that facts did not exist warranting the award of the contract.

**JUDGMENTS — PARTIES.** — THE TERM "PARTIES" INCLUDES all who are directly interested in the subject-matter, and who have a right to make defense, control the proceedings, examine and cross-examine witnesses and appeal from the judgment.

**PRACTICE.** — Where a fact is found by the trial court, and the finding is not excepted to, the appellate court will assume that the evidence upon which the finding was based was received without objection, and that the absence of the pleading was waived.

**JUDGMENT, NECESSITY OF PLEADING.** — When one of the issues in an action is the power of a municipal board to pass a resolution and enter into a contract, a former adjudication in which that point was determined is evidence for the defendant on that issue without being specially pleaded.

**JUDGMENTS — PARTIES.** — A MUNICIPAL BOARD whose duty it is to enter into contracts for the doing of work upon public streets of a city necessarily represents such city, and judgments against such board compelling it to act with respect to awarding a contract bind the city and the property holders to be affected by the contract, to the same extent as if the judgments were against the mayor and common council of the city.

*George T. Parker and John Van Voorhis, for the appellants.*

*Henry J. Sullivan, for the respondent.*

O'BRIEN, J. The plaintiffs sought to enjoin the collection of a local assessment, alleged to be apparently valid but in fact void, imposed by the municipal authorities of the city of Rochester, to defray the cost of a local improvement. The record shows that the plaintiffs are respectively the owners of parcels of real estate situate on Lake Avenue, between Vincent

Place and Lyel Avenue and Driving Park Avenue, which have been assessed for the improvement. They brought this action in their own behalf, and in behalf of all other persons having property fronting on the street and assessed for the improvement, for the purpose of obtaining a judgment declaring the assessment null and void, and enjoining the city treasurer, who is also made a defendant, from issuing his warrant for the collection thereof. The courts below have determined the controversy against the plaintiffs' contention, and the only question here is, whether there is any legal error in that determination. The question is really one of jurisdiction in the authorities to make the assessment. Under the charter of that city (Laws 1880, c. 14), the common council has power to order the paving and improvement of any street, and to pass the necessary ordinances requiring the same to be done, and to determine the manner and cost of such paving, and to designate the portion of the city which should bear the expense thereof. The work, when authorized and determined upon, is to be performed by contract, but the power of contracting for the execution of the work is, by the charter, devolved upon another separate and independent body, called the executive board. The power of this board to let and supervise the execution of the contract commences only after the common council has authorized the work and designated the district upon which the assessment is to be laid.

When the common council has authorized the particular improvement and described the district upon which the assessment is to be imposed, and ascertained the expense thereof, then the assessors of the city are to levy the amount upon the several lots and parcels of real estate in the designated territory, in proportion, as near as may be, to the benefit which such lot or parcel shall be deemed by them to have received by reason of the improvement, subject to the correction and confirmation of the common council. The assessment, when completed and confirmed, becomes a lien upon the several lots designated in the roll, and the same is delivered to the city treasurer, whose duty it is to collect the same. On the 11th of December, 1888, the common council duly adopted a resolution providing for paving the streets and avenues above mentioned with asphalt pavement, and therein directed the clerk to publish notice in accordance with the provisions of the charter for all persons directed to be assessed to appear at a meeting of the common council December 26, 1888, at

which time all persons interested could be heard. At this meeting, after hearing all parties interested, the common council adopted the final resolution for the improvement, in which the work is particularly specified, and the whole expense thereof directed to be assessed upon the property therein described. There is no criticism made upon the form or sufficiency of the resolution or the regularity of any of the proceedings up to this point. The resolution, however, did not become operative, for the reason that it was vetoed by the mayor, till January 8, 1889, when it was again unanimously adopted, notwithstanding such veto.

By reference to title 7 of the charter, it will be seen that the executive board is clothed with very extensive powers and intrusted with very important duties. The members are elected by the people, are required to devote their entire time to the business of the city, and are compensated by a fixed salary. They have the control of the expenditure of the funds for street purposes, and they are expressly made commissioners of highways of the city. The board can appoint and remove at pleasure the superintendent of streets, and fix his compensation. It is plain, from reading the enumeration of the various powers conferred upon the board by the charter, that the legislature intended to strip the common council of Rochester of most of the ordinary functions and powers that such a body exercises in other cities, and transfer them to this executive board. The common council has very little to do with respect to the care, improvement, and superintendence of the streets. The most important exception to this is the provision that whenever the expenses of any work or improvement shall be required to be paid for by a local assessment, the common council alone shall have power to pass the ordinance therefor.

But when the common council has passed such an ordinance, then the judgment and discretion with respect to such an improvement which the charter has confided to the board for the public good is at once called into action. The question as to the necessity and propriety of improving a street by local assessment must be passed upon by the common council in the first instance, but when that body makes its decision, another body, intrusted by law with the general subject of street expenditures and improvements, must carry it out, and the latter body is thereby vested with jurisdiction on the subject.

On the 19th of March, 1889, and more than a month after

the resolution was passed and sent to the executive board, a motion was made and adopted in the common council, "that action on the final ordinance for Lake Avenue . . . be reconsidered," and at a subsequent meeting, on March 28, 1889, another resolution was passed, "that further action on the pending final ordinance for Lake Avenue asphalt improvement be indefinitely postponed," and that the surveyor be ordered to prepare a new first ordinance for the improvement. The plaintiffs claim that this motion and resolution had the effect to withdraw from the board all authority conferred by the original resolution. The executive board, after receiving the copy of the first resolution, proceeded to act, and advertised for bids and received the same, and on March 12, 1889, postponed action thereon from time to time until March 29, 1889, when it laid the matter on the table. On the 25th of April, 1889, the board was served with a peremptory writ of *mandamus* from the supreme court, granted after a full hearing, requiring them to award the contract, and to show to the court, on a day subsequently, in what manner the writ was obeyed. On the 29th of April, the board entered into a written contract for the work in accordance with the first ordinance. The contract was performed, and on the 18th of October, 1889, the board certified the cost to the common council, in conformity with the charter, and that body then directed the assessors to assess the amount upon the parcels of land described in the original resolution. The assessors made the assessment and published notice of a hearing for all persons aggrieved, and after such hearing, certified the roll and delivered it to the common council. That body also published notice for a hearing before them, and after such hearing, confirmed the assessment, and caused the roll to be delivered to the city treasurer for collection. The resolution of the common council confirming the assessment was passed some time after June 6, 1890.

The plaintiffs' claim for relief is based upon the fact that the common council reconsidered and subsequently postponed indefinitely the resolution authorizing the improvement, and that consequently all subsequent proceedings were invalid. If the question as to the legal effect of the action of the common council in resolving to reconsider its former action was still open to the plaintiffs, we would be inclined to hold that the resolution was, by the adoption of the motion to reconsider, brought back to the stage in which it was before the

final vote by which it was originally passed. The vote on the resolution was reconsidered, and consequently the effect which it would otherwise have was lost: Jefferson's Manual, sec. 43; Roberts's Rules of Orders, 66.

The record shows that upon the application of certain of the property owners on the street, other than the plaintiffs, liable to be assessed for the improvement, the supreme court at special term awarded a *mandamus* against the executive board, commanding it to proceed upon the resolution and to award a contract for the performance of the work. That, acting in obedience to this command, the board did award the contract in accordance with the provisions of the charter prescribing the powers and duties of the board. The decision upon the application for the *mandamus* was a judgment of a court of competent jurisdiction. It adjudged that the resolution of the common council was in full force, notwithstanding the motion to reconsider, and that it was the clear legal duty of the executive board to proceed and let the contract. This judgment could not thereafter be questioned collaterally by any of the parties, nor any one else who was represented in the proceeding. They might attack it directly by appeal or motion to set aside, or for a rehearing, but so long as it remained unreversed and not set aside, it bound every one who was a party, or represented in any subsequent collateral action or proceeding. It is quite clear that it bound the property owners who applied for the writ, the executive board, and the city. The only question is whether it bound these plaintiffs who were not parties by name. But the judgment of a court of competent jurisdiction will sometimes operate as an estoppel and a former adjudication against persons who were not named in the proceeding and who were not parties to the record by name. It is enough if they were represented in the action or proceeding which resulted in the judgment, or were entitled to be heard. When a judgment is rendered against a county, city, or town in its corporate name, or against a board or officer who represents the municipality, in the absence of fraud or collusion it will bind the citizens and tax-payers. This is upon the principle that they are represented in the litigation by agencies authorized to speak for them, and to protect their interests: 1 Herman on Estoppel, 166; *Clark v. Wolf*, 29 Iowa, 197; *Lyman v. Faris*, 53 Iowa, 498; *Tredway v. Sioux City & P. R'y Co.*, 39 Iowa, 663; *Freeman on Judgments*,

sec. 178; *Robbins v. Chicago*, 4 Wall. 657; *Chicago v. Robbins*, 2 Black, 418; *Preble v. Supervisors*, 8 Biss. 358.

When a judgment is rendered by a competent court awarding a writ of *mandamus* against a board of supervisors or other body or officer having power to audit claims against a county or other municipality, commanding them or him to audit a claim or demand against the county or municipality, and it is audited in obedience to such command, the validity of the claim cannot be questioned subsequently by the tax-payers in any collateral action or proceeding. Their remedy is to appeal from the judgment awarding the writ or move for a rehearing. So, also, a receiver of a corporation, appointed in an action by the people for dissolution, represents the creditors, and a judgment that would estop him estops them also: *Her-ring v. New York etc. R. R. Co.*, 105 N. Y. 340.

We are not aware of any reason for holding that the principle does not apply to the plaintiffs in this case. True, this is not a general tax, but a special and local assessment. But it is nevertheless an exercise of the taxing power, and its validity as well as the right of the plaintiffs to question or assail it in the courts rests on the same principles as are applicable to an assessment or tax for general purposes. If the expense of the improvement was to be paid out of the city treasury, there would then be little doubt that an adjudication upon an application for a *mandamus*, involving as this did the validity of the proceedings up to that time, would have bound all the tax-payers. Is the rule any different when a small part or even the whole of the expense is to be paid by the property owners within a certain district? Is the principle changed because the area over which the tax was distributed is contracted? The executive board laid the matter on the table, and, in effect, refused to act, treating the resolution as rescinded by the common council. They were brought into court, and the very question involved was, whether the board had authority to contract for the execution of the work, and the court held, upon full argument and against the contention of the board, that they had. The question was, whether they had power under the proceedings to make a contract and incur an expense which was to be paid by the property owners, and it was adjudged that they had, and that it was their duty to do so. When the executive board was before the court on that application, they represented and spoke, not only for themselves and the city, but also the property owners who were to be

bound by the contract, and whose property was to be assessed for the expenditure which the work embraced in the contract involved. When the court directed the board to make the contract, the effect of its judgment was to direct the imposition of a tax upon the plaintiffs' property. On that question the plaintiffs could have been heard, and on their application were entitled to a hearing, and to be made parties to the proceeding, and to appeal from the decision. This was a right that no court would have denied to them had they demanded it. The code (section 452) provides that "where a person not a party to the action has an interest in the subject thereof, or in real property the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by the the proper amendment": *People v. Albany etc. R. R. Co.*, 77 N. Y. 232.

The executive board, in making the contract and supervising the work, acted, in a certain sense, as the agents of the property owners: *Matter of Anderson*, 109 N. Y. 554; and therefore the judgment of the court, that the resolution of the common council was still in force, not only bound the agents, but the parties they represented as well. There are cases where an order of a court, such as an order of confirmation, is a part of the statutory proceedings for imposing the assessment. Such an order, when made upon the application of the city, might not be conclusive in all cases upon the property owner as to jurisdiction or the validity of the proceeding, especially where statutory methods of review are provided. We do not now stop to point out cases where the principle we are now considering would not apply. All we hold now is, that it is applicable to the facts of this case. Granting that the resolution of the common council to make the improvement was, in effect, rescinded by the motion to reconsider, still a competent court held otherwise, in a proceeding to which the executive board was a party, and that board was compelled by the judgment in that proceeding to make the contract which they did. The plaintiffs looked on, neglected to intervene in the application for the *mandamus*, or to appeal from the order granting it. They knew that the contract was made, and the work on the street in front of their property executed, and they have the benefits of the same. They witnessed the proceedings by which the tax was assessed and confirmed, and they made no resistance until the proceedings



were completed and the expense incurred. We think that under such circumstances the plaintiffs are estopped from raising the question now, that the executive board was without power to contract for the work by reason of the motion to reconsider the resolution in the common council. The plaintiffs had the statutory notice of all the proceedings under the charter, and the proceedings before the court were of such a public nature, and they were so connected with the interests of the plaintiffs, that we must assume that they had knowledge of all that transpired. This court has sanctioned the principle stated in *Robbins v. Chicago*, 4 Wall. 657, that "persons notified of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they willfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced": *Village of Port Jervis v. First National Bank*, 96 N. Y. 557.

In any inquiry with respect to the binding force of a former judgment, the term "parties" includes all who are directly interested in the subject-matter, and who have a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment: *Robbins v. Chicago*, 4 Wall. 657.

There is a stipulation in the record by the respective attorneys to the effect that none of the plaintiffs were parties or privies to the proceeding for the *mandamus*. This, of course, was not intended to bind the court upon any question of law arising upon undisputed facts. Its only effect is to establish a fact, namely, that none of these plaintiffs were parties to that proceeding by name, nor do they stand in the place of any of the property owners who applied for the writ. The legal conclusions to be drawn from the findings and the proceedings contained in the record were left open. While we have not been able to concur in the reasons for the decisions given by the courts below, yet we think that the judgment was right, and should be affirmed, with costs.

Upon a motion for a reargument the following opinion was handed down: —

O'BRIEN, J. We have considered the points submitted in support of this motion, and we are of the opinion that it should

be denied. A former adjudication upon the question at issue is conclusive as a bar or as evidence. It is said that the proceedings resulting in the writ of *mandamus* were not pleaded, and therefore are not available to the defendant. The fact, however, is found by the trial court, and it was not expected to. Under such circumstances, effect must be given to the finding. This court will assume that the evidence upon which the fact was based was received without objection, and that the absence of a pleading was waived. If the finding had been excepted to, the plaintiffs could raise the point now that it was not sustained by evidence or pleading, but as no such exception appears, they are in no position to attack it: *Daniels v. Smith*, 130 N. Y. 696. But clearly one of the issues presented by the pleadings was the power of the executive board to pass the resolution and enter into the contract. A former adjudication in which that point was determined was evidence for the defendant on that issue, and the judgment upon the application for a *mandamus* was such an adjudication: *Culross v. Gibbons*, 130 N. Y. 447.

The common council had no power to make the contract, but the executive board had. Therefore, in entering into such contracts, the board represents the city in the same sense that the mayor and common council would represent it if the duty devolved upon them, and a judgment in an action or proceeding against the board to compel them to act with respect to the awarding of the contract, in which it is decided that the board has the power and it is their duty to proceed, estops the city. The board, in such matters, represents the city in the same way that the board of supervisors represents the county in auditing claims against it, under the direction of a judgment. It is true that this point was not argued, but the finding necessarily injected it into the case.

Whether the plaintiffs were privies or not depended upon the legal conclusion to be drawn from the finding of the court, and not from any designation given them in the stipulation. That is satisfied when construed to mean that none of these plaintiffs were parties to the record, or stand in the place of any person who was by succession or transfer.

The motion should be denied, with costs.

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RES JUDICATA: See notes to *Hill v. Bain*, 15 R. I. 75, 2 Am. St. Rep. 876-878, and *Sauls v. Freeman*, 24 Fla. 209, 12 Am. St. Rep. 190, where instances are given of the binding effect of judgments on persons who are not formal par-

ties to the record. As to the extent to which indemnitors are concluded by a judgment against their principal, see note to *Robinson v. Baskins*, 22 Am. St. Rep. 204-207.

THE PARTIES TO TWO SUITS MUST BE REGARDED AS THE SAME when the complainants in both were certain tax-payers of a municipality suing on behalf of themselves and all other tax-payers, and the defendants in both, though consisting of different persons, were in each suit representing and acting for the municipality without any private interest: *Gallagher v. Moundville*, 34 W. Va. 730; 26 Am. St. Rep. 942.

PROPERTY OWNER'S RIGHT TO A HEARING: See *Thomas v. Gain*, 35 Mich. 155; 24 Am. Rep. 536. Assessment proceedings are not void because no notice thereof was previously given by the committee who laid out the street, if the charter of the city does not require notice: *Nichols v. Bridgeport*, 23 Conn. 189; 60 Am. Dec. 636. And where the statutory requirements as to notice have been complied with, want of notice in fact furnishes no ground for relief: *Methodist P. Church v. Baltimore*, 6 Gill, 391; 48 Am. Dec. 540.

## OAKES v. DE LANCEY.

[133 NEW YORK, 227.]

**BOUNDARIES — SHORE.** — Where the courses and distances designated in a conveyance are such as to extend the property conveyed to low-water mark of Long Island Sound, it will include all the shore above such mark, though one of the calls is to a point on the shore, and the next call is "thence running along said shore and sound as the same bend and turn." The point on the shore called for in the description may be anywhere upon the strip lying between low and high water, and where it is, must, therefore, be determined from the courses and distances given in the conveyance.

**BOUNDARIES — THE WORDS "MORE OR LESS" AND "ABOUT,"** used in a conveyance in connection with quantity or as qualifying distances, are words of precaution and safety intended to cover some unimportant inaccuracy, and they do not weaken or destroy such indications of distance and quantity, when no other guides are furnished.

**ACTION** to recover a sum of money claimed to be an overpayment for a tract of land purchased by the plaintiff of the defendant. By the terms of an auction sale the land was described as containing 22.57 acres, but the plaintiff insisted that it contained only 18.734 acres. To sustain the contention of the plaintiff, it was necessary for him to establish that the tract of land conveyed to him did not extend farther than to high-water mark. Judgment in the trial court in favor of the defendant was affirmed at the general term.

*Artemas H. Holmes*, for the appellant.

*Martin J. Keogh*, for the respondent.

FINCH, J. The only question raised by this appeal is over the true construction of the deed given by the defendant. The premises were described as "Vergemere," and bounded on the north and east by the waters of Long Island Sound, and the dispute is whether the description of the conveyance includes or excludes the strip of land on the water-fronts between high and low water, and which constitutes the shore. The description is thus phrased: "Beginning at a point in the center line of an avenue sixty feet wide, known as De Lancey Avenue, which point bears south forty-two degrees and forty-seven minutes west, thirty feet from the point of intersection of the division line between the property hereby conveyed and the land conveyed by the late Peter John De Lancey of Geneva, New York, to James J. Burnett, with the northeasterly line of said De Lancey Avenue, and thence running along said division line north forty-two degrees and forty-seven minutes east, about eight hundred and sixty-five feet to a point on the shore of Long Island Sound; thence running along said shore and sound as the same bend and turn easterly and then southerly to their intersection with the center line of De Lancey Avenue aforesaid, and thence running along said center line of said De Lancey Avenue forty-nine degrees and fifty-five minutes west, about twelve hundred and eighty-eight feet, to the point or place of beginning, containing twenty-two acres and fifty-seven hundredths of an acre of land, be the same more or less."

It will be observed that the starting-point of this description is fixed with accuracy and care, and the surveys show that the first course, if run in obedience to the distance given, will extend to low-water mark, and that the last course, to obey the same requirement of distance, must start at low-water mark on the easterly water-front. The surveys also show that the strip between high and low water must be included in order to correspond with the quantity of land which the deed purports to convey. The courses and distances and the quantity of land carry the description to low-water mark, and can only be satisfied by including the area of the shore.

But the appellant, relying upon the rule that fixed monuments control, and distances and quantities must yield to their safer and superior authority, insists that the shore is such a monument, and by the shore is always meant the line of high water when the boundary is the sea. That is undoubtedly true, and would be decisive if the first course ran simply

to the shore. But it does not. It goes not to the shore, but "to a point on the shore." That point may be anywhere upon the strip lying between high and low water, and where it is must be determined, and can only be determined, by the sole direction furnished, which is the distance. That distance fixes the point at the outer or low-water line of the shore, and so, and only so, is the description satisfied. The first course ends at "a point on the shore," and about eight hundred and sixty-five feet from the fixed starting-point. Having found this "point on the shore," we are required to go "along said shore and sound" easterly and then southerly. Starting thus on the line of low water, we must follow that line. The words are not only "along the shore," but also "along the sound," and a line starting at low water and then running away from it on a diagonal to the line of high water, and thence easterly on that line, is neither described nor intended. It would fail again when the return course to the starting-point is reached. That calls for about twelve hundred and eighty-eight feet, and can only be satisfied by beginning the course at low-water mark. To these indications of the intent must be added the quantity of land stated to be conveyed, which requires the inclusion of the shore, and is seriously defective if that be excluded. The use of the words "more or less" in connection with the quantity, and the use of the word "about" as qualifying the distance, do not alter the conclusion to be drawn. They are words of safety and precaution, and intended to cover some slight or unimportant inaccuracy, and while enabling an adjustment to the imperative demands of fixed monuments, do not weaken or destroy the indications of distance and quantity when no other guides are furnished: *Belknap v. Sealey*, 14 N. Y. 143; 67 Am. Dec. 120.

The appellant further insists that the title to the shore is presumably in the state. That, with us, is the common-law rule, but does not exclude the possibility of title in the grantor derived from the sovereign or obtained by prescription. There is no question of title in the case, and we know nothing about it. Certainly we ought not to presume a want of title in the grantor in order to construe a description which implies such title.

There is nothing in the case of *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155, upon which the appellant mainly relies, adverse to our conclusion. In that case the description in the first deed ran "to the shore," which was held to be the line of high

water. In the second deed the course ended at a heap of stones "at the shore," and ran thence "by the shore." That heap of stones at "William Elwell's corner" was treated as a possible monument, which, if found at the line of low water, would carry the description there, and thence "by the shore" would follow the line of low water. The point on the shore, or at the shore, fixed in that case at low water by a monument in the form of a heap of stones at a corner, is fixed here without a monument by the sole remaining guides, which are distance and quantity, at a point on the shore at low-water mark.

We think the judgment is right, and should be affirmed, with costs.

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MEANING OF WORDS "MORE OR LESS." — In addition to the case cited by the court in the principal case, see the following: *Dow v. Jewell*, 18 N. H. 340; 45 Am. Dec. 371; *Frederick v. Youngblood*, 19 Ala. 680; 54 Am. Dec. 209; *Jones v. Plater*, 2 Gill, 125; 41 Am. Dec. 408; *Triplett v. Allen*, 26 Gratt. 721; 21 Am. Rep. 320; *Paine v. Upton*, 87 N. Y. 327; 41 Am. Rep. 371; *Baynard v. Eddings*, 2 Strobr. 374. In descriptions of the quantity of land, the words "more or less" import that quantity does not enter into the essence of the contract of sale, and in the absence of fraud, a party cannot claim relief for a deficiency by an abatement of the price: *Tyson v. Hardesty*, 29 Md. 805; *Hunt v. Stull*, 3 Md. Ch. 24. But they should be restricted to an allowance for a slight variation of instruments and small errors in surveys. The word "about" will not cover a large deficiency, and a grantee should not be compelled to accept thirty-six acres where the deed calls for sixty-five: *Baltimore etc. Soc. v. Smith*, 54 Md. 187; 39 Am. Rep. 374. It implies simply a near approximation to the actual number of acres: *Stevens v. McKnight*, 40 Ohio St. 341. Where it is used to qualify a distance, it should be rejected, unless there are other words making it necessary to retain it, and the distance taken positively: *Johnson v. Pannel*, 2 Wheat. 206.

THE WORDS "FROM" OR "TO" AN OBJECT, as a general rule, exclude the object: *Bonney v. Morrill*, 52 Me. 252. But "from a street" does not necessarily mean from its nearest line: *Pittsburgh v. Cluley*, 74 Pa. St. 259. And distances called for between corners and to creeks or roads, unless specially designated in such manner as to show the intention to make them locative, are not locative, and will not ordinarily have precedence over a call for course and distance: *Jones v. Andrews*, 72 Tex. 5. As the "shore" is an object of appreciable width, it seems open to question whether the statement of the court in the principal case, that the words "to the shore" without more must necessarily mean "to the side of the shore first reached," is not somewhat too sweeping. The only reason for the rule that fixed monuments control courses and distances is, that instrumental observations and chain measurements are liable to error, while natural or artificial marks, in the absence of any evidence that they have been moved, must indicate unerringly the boundaries actually fixed. The "shore" is such a monument, and as a general rule, it may be admitted that calls for course and distance would be disregarded if it was impossible to make them harmonize with a call for the "shore." But is this a general rule of such paramount and controlling force that it should be rigidly applied in a certain manner, whatever the character and width of the

object used as a monument, and whatever the accuracy of the survey? We venture to doubt it. The figures given in the statement of the facts of the principal case do not include the width of the shore, but from the other data given, it could not have been less than about one hundred and thirty feet on the average. It certainly seems rather too strong an application of the general rule to assume that one and only one side of such a broad strip of land can be meant, in the face of the fact that such a supposition would saddle what was evidently a very careful survey with two independent and distinct errors of measurement, amounting to about fifteen per cent on one side of the tract, and ten per cent on the other. Under all the circumstances of the case, therefore, we are inclined to think that the decision should have been the same, even if the call had been "to the shore" simply, and that the theory implied in the learned judge's *dictum* as to the point is untenable. In other words, we think that the mention of a strip of considerable width as the terminus of a carefully measured distance should allow us to fix the point actually measured to anywhere within the two edges of that strip, and that the presumption that the edge first reached in the end of the course is not so uncontrollable as to overcome reasonably strong evidence that it extended farther. See note to *Allen v. Weber*, 27 Am. St. Rep. 60-63.

## PALMERI v. MANHATTAN RAILWAY COMPANY.

[133 NEW YORK, 261.]

**COMMON CARRIERS — LIABILITY OF, FOR TORTIOUS ACT OF AGENTS.** — If a ticket agent of a railway company, after the purchase by a woman of a ticket from him, immediately comes upon the platform of the station and there charges her with giving him counterfeit money, and insists upon her giving him another piece in lieu of that received by him from her, and upon her refusal to do so, places his hand upon her shoulder, tells her not to stir until he has procured a policeman to arrest and search her, and calls her a counterfeiter and a common prostitute, such agent is acting for his employers in an endeavor to protect or recover their property, and they are answerable in damages for what he does and says. Though injury and insult are acts in departure from the authority conferred or implied, nevertheless when they occur in the course of the employment, the master is answerable for the wrong committed.

**WITNESSES — EVIDENCE TO DISCREDIT.** — Refusal of a court, on cross-examination of a plaintiff suing for damages alleged to have resulted from false imprisonment and defamation of character, to permit defendant to prove that plaintiff was an habitual litigant was proper.

*Brainard Tolles*, for the appellant.

*James D. Bell*, for the respondent.

GRAY, J. Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police-officers, of a person in the railroad station whom he suspected of being a counterfeiter, and the company was thereafter sued for false imprisonment. In that case the facts

were, briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description suspected of passing counterfeit bills. Upon a certain occasion two men came into the station, and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police, and thought the bill looked "queer"; but nevertheless took it and gave back the change with the tickets, saying nothing to them. He then sent for a police-officer, to whom he pointed out the men, who were then on the station platform. The bill was subsequently pronounced to be genuine, and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interests, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine, and when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employers or his employment required of him. I refer to the case of *Mulligan v. New York etc. R'y Co.*, 129 N. Y. 506; 26 Am. St. Rep. 539. In the present case, however, the acts of the ticket agent were of a different character.

The plaintiff purchased a ticket of the agent at the elevated railroad station, and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money, and demanded another quarter in place of the one given him. She insisted upon her money being genuine, and refused to give another quarter or to hand back the change. He became angry, and called her a counterfeiter and a common prostitute. He placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and to search her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages because of injury sustained



from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words publicly spoken concerning her. The jury believed her story, and the judgment, which she has recovered, the appellant seeks to avoid; principally upon the ground that the ticket agent was acting outside of the scope of his employment in doing the acts complained of. The appeal must fail. This is not like the Mulligan case. Here the agent was acting for his employers, and with no other conceivable motive, losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property, and if, in his conduct, he committed an error which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business intrusted to him the carrier becomes civilly liable if its passengers or strangers receive injury therefrom. The good faith and motives of the servant are not a defense if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases, of which *Weed v. Panama R. R. Co.*, 17 N. Y. 362, 72 Am. Dec. 474, *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, *Stewart v. Brooklyn etc. R. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185, and *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117, 17 Am. St. Rep. 611, are sufficient instances.

What materially distinguishes the present from the Mulligan case is, that there the servant of the company was not acting for the protection of the company's interests; but went quite outside the line of his duty, to perform a supposed service to the community by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business; whereas here the ticket agent clearly was engaged about the company's affairs, but in the belief of the jury, unlawfully detained the plaintiff and insulted her by slandering her

character. It is needless to consider the case of *Mali v. Lord*, 39 N. Y. 881, 100 Am. Dec. 448, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched upon suspicion of a theft, and whose general employment could not warrant such an act, and the present case of an agent, who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insult are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed. Judge Andrews, in *Rounds v. Delaware etc. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597, points out the distinguishing principle of these cases, and refers to *Mali v. Lord*, 39 N. Y. 881, 100 Am. Dec. 448, in the course of his opinion.

The offer by defendant, upon plaintiff's cross-examination, to show that she was an habitual litigant, was properly excluded. It had nothing to do with the issue, and if true, would not prove her unworthy of belief, any more than it would follow, from her admission of its truth, that the litigations, which such a tendency had encouraged, were not upon meritorious grounds. The testimony of the witness Murphy, a by-stander upon the occasion, as to the ticket agent's conversation with him, I think was admissible, as occurring simultaneously and as illustrating somewhat the transaction; but even if questionable, the defendant appears to have objected to the testimony after it was in, and obtained no ruling by motion to strike out. When, subsequently, upon it appearing to the court that the plaintiff did not hear the conversation, an objection to the testimony continuing was made, it was considered proper by the judge and was at once sustained.

The judgment should be affirmed, with costs.

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LIABILITY OF RAILROAD COMPANY FOR ACTS OF EMPLOYEES. — A railroad company is answerable for acts of its servants in the course of their employment, whether abusing or rightfully pursuing the powers conferred on them, and whether acting within or in direct violation of their instructions: *Lake Shore etc. R. R. Co. v. Brown*, 123 Ill. 162; 5 Am. St. Rep. 510; *Chicago etc. R. R. Co. v. West*, 125 Ill. 320; 8 Am. St. Rep. 380. Thus a company is liable in exemplary damages in case of injury to passenger resulting from a violation of duty by one of its employees in the conduct of the train, if such violation of duty be accompanied by oppression, fraud, malice, insult, or other willful misconduct, evincing a reckless disregard of conse-

quences: *Louisville etc. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600. But in *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 8 Am. St. Rep. 538, it was held that a sleeping-car company is not liable as common carrier for injury to a stranger, who, upon entering one of its cars to ask the privilege of washing his hands, is wantonly and without provocation assaulted and beaten by the porter of the car. In such a case there is no contractual relation between the parties.

As to the liability of street-car companies for the wrongful treatment of passengers by employees, see *Savannah St. R. R. Co. v. Bryan*, 86 Ga. 312; 22 Am. St. Rep. 464; *Central R'y Co. v. Peacock*, 69 Md. 257; 9 Am. St. Rep. 425. Where a conductor on a street-railway procures the arrest of a disorderly passenger, such act not being within the scope of his authority, and the company does not adopt his action, the company is not liable: *Cunningham v. Seattle etc. Co.*, 3 Wash. 471; *Lafitte v. New Orleans etc. R. E. Co.*, 43 La. 34.

## HAYNES v. ALDRICH.

(183 NEW YORK, 287.)

**LANDLORD.** — FROM TENANT'S holding over after the expiration of his term, the law implies an agreement to hold for a year upon the terms of the prior lease. The option to so regard it is with the landlord, and not with the tenant, and the latter holds over at his peril.

**LANDLORD AND TENANT — UNINTENTIONAL HOLDING OVER.** — The fact that a tenant informed his landlord that he did not wish to renew his lease, and that he intended to surrender possession at its termination, but was prevented from doing so for a couple of days by difficulty in procuring trucks and by the illness of a boarder, will not prevent such holding over from operating as a renewal of the lease for another year if the landlord elects to so treat it.

**LANDLORD AND TENANT. — LESSOR'S ELECTION TO TREAT A HOLDING OVER AS A RENEWAL OF THE LEASE** for another year, having been manifested in direct and unequivocal language, is not avoided by evidence that he subsequently visited the premises, and finding them deserted by his tenant, had some repairs attended to, and tried in vain to rent them to another tenant.

*Henry Galbraith Ward*, for the appellant.

*Stephen H. Olin*, for the respondent.

**FINCH, J.** Judgment was ordered against the defendant upon the trial of this action for rent accrued after the expiration of her original lease, upon the ground that by holding over after such expiration she became a tenant for another year, upon the terms of the prior written lease. The facts disclosed were, that such lease ended by its terms on May 1, 1889 that it contained a provision that the premises should be occupied as a private dwelling, and a covenant not to sublet without the written consent of the lessor. Both stipulations

were violated. The tenant, without permission, rented the premises to Mrs. Coventry, who occupied them as a boarding-house, and received, as one of her boarders, a lady who was a chronic invalid and continuously ill. On the 4th of February, 1889, the lessor inquired of the lessee whether she desired to renew her lease for another year, and was informed that she did not. The first day of May was a holiday, and possibly the tenant had until noon of the next day for a surrender of possession. But the possession was retained by the tenant until the afternoon of May 4th, when the keys were tendered, but refused. The excuse given is, that on the second day of May, there was difficulty in engaging trucks; that the removal began on the 3d, but the sick boarder could not then be moved with safety, and was not moved until the 4th.

This court held in *Commissioners of Pilots v. Clark*, 33 N. Y. 251, that the rule is too well settled to be disputed that where a tenant holds over after the expiration of his term the law will imply an agreement to hold for a year upon the terms of the prior lease; that the option to so regard it is with the landlord, and not with the tenant, and that the latter holds over his term at his peril. In *Conway v. Starkweather*, 1 Denio, 114, the tenant had notified the landlord of his intention not to remain for another year, as was the fact in the present case, but nevertheless did hold over for a fortnight, and the fact of the notice was held to be immaterial, the court saying: "The act of the plaintiff in holding over has given the defendants a legal right to treat him as tenant, and it is not in his power to throw off that character, however onerous it may be."

The appellant does not deny the rule, but seeks to qualify it so as to mean that it is only where the tenant holds over voluntarily and for his own convenience that the landlord's right arises; and that it does not so arise when the tenant holds over involuntarily, not for his own convenience, but because he cannot help it. I am averse to any such qualification. It would introduce an uncertainty into a rule whose chief value lies in its certainty. The consequent confusion would be very great. Excuses would always be forthcoming, and their sufficiency be subject to the doubtful conclusions of a jury, and no lessor would ever know when he could safely promise possession to a new tenant. The cases cited by the appellant do not bear out his contention. In *Smith v. Allt*, 7 Daly, 492, the holding over was in part the act and assent of the landlord,

and occasioned by pending negotiations, and could not have been said to be the sole act of the tenant. In *Shanahan v. Shanahan*, 53 Jones & S. 844, it appeared that the 1st of May was Sunday, that the tenant began to move on the afternoon of the 2d, that the removal continued during the 3d, and for that reason the tenant was held liable. The court did interject the remark that there was no unavoidable delay in moving, but without seeking to change or modify the rule. In *McCabe v. Evers*, 30 N. Y. St. Rep. 833, decided in 1890 in the New York city court, it appeared that the tenant moved out on the 1st of May, but left behind him an old stove and some rubbish, and tendered the key on the 2d of May. The court held that the evidence of a holding over was inconclusive and ambiguous, and the question should have been submitted to the jury. In *Maney v. Clemens*, 34 N. Y. St. Rep. 833, decided by the same court, the term expired on February 2d, at noon; the tenant began his removal in the morning and worked till midnight. There was a verdict against the landlord, which the court refused to set aside.

These cases, even if regarded in all respects as correctly decided, fall very far short of establishing the appellant's doctrine, or justifying a reversal in the present case. There is no question here about the fact of a holding over, and no question, therefore, in that regard for the solution of a jury. The tenant remained in possession voluntarily, for her own convenience and that of her sick boarder. If it was unsafe to remove the latter, the situation was wholly the fault of the tenant who sets up as an excuse for one violation of the lessor's rights the consequences of her own earlier violation of the terms of the lease. No impossibility of removal was shown, merely difficulty and inconvenience, which should have been and might have been foreseen and provided against. If the rule in this case seems to involve a hardship, that is sometimes true of every general rule, however just and wise, but does not justify its abrogation. To sustain this defense would open the door to a destruction of the settled doctrine, and tend to involve the rights of both lessor and lessee in uncertainty and confusion.

I do not mean to say that whether there has been a holding over at all may not sometimes be so doubtful upon the facts as to require a submission to the jury. I mean to say that there is no such doubt in the present case. I reserve the question, also, whether there might not be an unavoidable delay, in no manner the fault of the tenant, directly or indirectly, which

would serve as a valid excuse. It is enough that here was a holding over not unavoidable, which might have been provided against, and where the chief difficulty grew directly out of the tenant's own wrongful act.

It is claimed, however, that the further question whether the lessor exercised the permitted option or took possession in her own right should have been submitted to the jury. I think the facts admit of but one inference. The lessor did exercise her option, and that promptly and clearly. When the keys were tendered to her mother they were refused. In the afternoon of May 4th the lessor went to the house to see what was occurring. She found it deserted and the windows open; her property needed protection. Under the lease she had a right to enter and relet it as the agent of the tenant. A policeman entered through the open window. Some keys were found on the mantel and thereafter used, but evidently not all, for others were restored much later. The premises were somewhat damaged, and the lessor had a little painting and some plumbing done, amounting only to ordinary and needed repairs. She tried to rent the house, but failed, and went to Europe during the summer, and occupied the house in the fall under a stipulation which expressly reserved her existing rights. Upon these facts no inference was justified, except that drawn by the court. There was a clear refusal to accept the surrender offered, and the repairs were consistent with that position, and with the right reserved in the lease.

We think the judgment was correct, and should be affirmed, with costs.

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**HOLDING OVER BY TENANT.** — The general rule is, that if a tenant for one or more years holds over at the expiration of his term, the landlord may either treat him as a trespasser or as a tenant for another year, upon the terms of the prior lease, as far as applicable: *Schnyler v. Smith*, 51 N. Y. 309; 10 Am. Rep. 609; *Providence County Savings Bank v. Hall*, 16 R. I. 164. If the only alteration in their agreement is an increase of rent, the same rule prevails: *Zippar v. Reppy*, 15 Col. 260. And a like principle controls the cases in which the landlord and tenant hold title as tenants in common: *Harry v. Harry*, 127 Ind. 91. If the landlord takes possession after a surrender of the demised premises, and relets them, he will be deemed to have accepted the surrender, unless there are facts rebutting this inference. Such rebutting facts are a refusal to accept a surrender, and a notification to the tenant that he would hold him for the rent: *Underhill v. Collins*, 132 N. Y. 269. Mere notice by the tenant, before the term expires, that he does not wish the premises for another year, will not change the effect of his holding over: *Smith v. Bell*, 44 Minn. 524. But where the lessee's household goods remained in the house, packed up and ready for removal, for three days after

the expiration of the term, the lessor being absent from home, and his agent having declined to receive the key of the house and the rent due, and having directed the lessee to await the lessor's return, but the key was promptly surrendered to the lessor on his return and accepted by him, it was held that there was no such holding over as would render the lessee liable as a tenant from year to year: *Adler v. Mendelson*, 74 Wis. 464.

## MATTER OF BOARD OF STREET OPENING.

[133 NEW YORK, \$23.]

**A CEMETERY IS NOT DEVOTED TO PUBLIC USES**, when the public generally never had any right to burial therein, and no burials therein could be made except by permission of the church corporation to which it belonged.

**EMINENT DOMAIN, WHAT SUBJECT TO — CEMETERIES.** — The fact that lands have been previously devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain. That is an absolute transcendent power belonging to the sovereign, which can be exercised for the public welfare whenever the sovereign authority determines that necessity for its exercise exists, and the dwellings of the living and the resting-places of the dead may be alike condemned.

*S. P. Nash*, for the appellants.

*D. J. Dean*, for the respondent.

**EARL, C. J.** The act, chapter 320 of the Laws of 1887, provides that the board of street opening and improvement of the city of New York "is authorized and empowered to select, locate, and lay out such and so many public parks in the city of New York south of One Hundred and Fifty-fifth Street as the board may, from time to time, determine," and it confers upon the board power to acquire for park purposes, by condemnation proceedings under the statute, "any and all lands, tenements, and hereditaments which said board shall deem necessary to be surveyed, used, or converted for the laying out, surveying, and monumenting of any park so selected as aforesaid." The board instituted this proceeding under the act to acquire for park purposes the title to land below One Hundred and Fifty-fifth Street, known as St. John's cemetery, which belonged to a religious corporation in the city of New York, commonly called Trinity Church. It was established as a cemetery as early as 1801, and was used for that purpose until 1839, during which time about ten thousand human bodies had been buried therein. In 1839 an ordinance was passed by the city of New York forbidding interments south of Eighty-sixth Street, and since that time no interments have been made in

the cemetery, but Trinity Church has preserved and kept it in order, and prevented any disturbance thereof.

It is contended on behalf of Trinity Church that under the general authority given by the statute of 1887, this land, which had been devoted to cemetery purposes, could not be taken for a park. The authority conferred upon the board by the act is broad and general. It is authorized to take for park purposes any land south of One Hundred and Fifty-fifth Street. It is undoubtedly true that this general language would not be sufficient to authorize it to take land which had been previously taken for, and was then devoted to, a public purpose: *Matter of New York etc. R'y Co.*, 99 N. Y. 12; *Suburban Rapid Transit Co. v. Mayor etc.*, 128 N. Y. 510. But this was not a public cemetery, and so far as appears in this record, had never been devoted to a public use. The public generally never had any right of burial therein. No burials therein could be made except by permits given by Trinity Church, and all the interments therein had been made by its authority. The cemetery land was, therefore, devoted to a private and not to a public use: *Matter of Deansville Cemetery Ass'n*, 66 N. Y. 569; 23 Am. Rep. 86.

The fact that lands have previously been devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain. That is an absolute transcendent power belonging to the sovereign, which can be exercised for the public welfare whenever the sovereign authority shall determine that a necessity for its exercise exists. By its existence the homes and the dwellings of the living and the resting-places of the dead may be alike condemned.

It seems always to have been recognized in the laws of this state, that under the general laws streets and highways could be laid out through cemeteries, in the absence of special limitation or prohibition. So it is provided in section 10 of chapter 133 of the Laws of 1847, entitled "An act authorizing the incorporation of rural cemetery associations," that "no street, road, avenue, or thoroughfare shall be laid through such cemetery, or any part of the lands held by such association for the purposes aforesaid, without the consent of the trustees of such association, except by special permission of the legislature of the state." The act, chapter 273 of the Laws of 1886, authorizing the incorporation of associations to erect monuments to perpetuate the memory of soldiers who fell in defense of the Union, contains a similar provision. The act, chapter 843 of



the Laws of 1868, provides that no private or public road shall be laid out or constructed upon or through any graveyard or burying-ground in this state, unless the remains therein contained are first carefully removed and properly reinterred in some other burying-ground at the expense of the persons desiring such road. The act, chapter 203 of the Laws of 1878, provides for the incorporation of pipe-line companies, and empowers them to take land by condemnation proceedings, and in section 34 it is provided that "no company formed under the provisions of this act shall locate or construct any line of pipe or pipe-line through or under any building, door-yard, lawn, garden, or orchard, except by the consent of the owner thereof in writing, duly acknowledged before some officer authorized to take acknowledgments of deeds; and no pipe-line shall be constructed through any cemetery or burial-ground." It is the necessary implication that but for the express prohibitions contained in these statutes, under the general provisions of law authorizing the construction of streets, highways, and pipe-lines, cemetery lands would not be exempt from invasion.

We have not overlooked the cases in which the general language of statutes has been limited and curtailed of its literal import so as not to give the statutes effect beyond the intent of the law-makers. But here we can find no sure ground for curtailing the scope of the statute which we have to construe. We certainly cannot be sure that the law-makers, if they had known of this cemetery, disused for burials for fifty years and never more to be used for that purpose, located in the midst of a dense and teeming population, would have preferred that it should remain appropriated for the resting-place of the long since dead, rather that it should be devoted to use for the comfort, welfare, and health of the living. We cannot say that the taking of such a cemetery for such a use is such an unreasonable, unnatural, impolitic, or unjust thing that we ought to hold that the general language of the statute does not authorize it to be done.

We have examined the authorities to which our attention has been called by the learned counsel for Trinity Church, and none of them in the least degree sustain the contention that lands devoted to private cemeteries owned by private individuals or a private corporation cannot be condemned under the general language authorizing their condemnation for public use. On the contrary, the following authorities give strong

sanction to the claim that such lands can be taken under general legislative authority for a public use unless specially protected by statute: *Wood v. Macon etc. R. R. Co.*, 68 Ga. 539; *In re Opening of Twenty-second St.*, 102 Pa. St. 108; *Egypt St.*, 2 Grant Cas. 455; 4 Bradf. 503; *Schoonmaker v. Reformed Dutch Church*, 5 How. Pr. 269; *In the Matter of Albany St.*, 11 Wend. 149; 25 Am. Dec. 618; *Windt v. German Reformed Church*, 4 Sand. Ch. 471.

What are the limits of the doctrine contended for on behalf of Trinity Church? If a cemetery has for a century been disused as a place of burial, can it not, if the welfare of the public require it, be taken for public use? Countless millions of the human race have been interred in the earth, and must their remains be inviolably left where they are found so long as they can be distinguished from the earth which contains them? There is no law which prohibits the removal of human remains from a cemetery for lawful purpose and placing them elsewhere. On the contrary, the law regulates their removal in certain cases: Laws 1878, c. 349; Laws 1847, c. 133, sec. 11, as amended by chapter 566 of the Laws of 1880. The remains of the dead in this cemetery can be removed without violating any law, and certainly without violating the law (Pen. Code, sec. 311) against body-stealing.

Trinity Church, having given permits for burials in this cemetery without granting any interest in the lots in which the burials are made, could at any time remove the remains of the dead and place them in a suitable manner in some other cemetery. No one has acquired any right from it that their remains shall forever remain there. It could not remove them and leave them exposed in the street or elsewhere. Such an act would shock public sentiment, and could probably be restrained by action in the name of surviving relatives. But that it could decently remove them and place them in some other proper place cannot be doubted. As said by the learned vice-chancellor in *Windt v. German Reformed Church*, 4 Sand. Ch. 471: "The only protection offered to the remains of the dead interred in a cemetery of this description is by the public laws prohibiting their removal, except on the prescribed terms, and in a still stronger public opinion. Probably these furnish all the protection which is consistent with the exigencies of a large city, the population of which increases with marvelous rapidity, and whose wants leave but little room for the remains of the dead in the dense and crowded haunts and thor-

oughfares of the living." By this proceeding the city of New York will acquire all the title of Trinity Church, and it will thus be clothed as owner of the land with all the rights Trinity Church had, and thus it will and must find some way to dispose of the remains in a manner that will not shock the refined sensibilities or the pious sentiments of the living. It is not needful, however, to determine now what the precise duties and obligations of the city will be in reference to these remains. It is enough now to determine that there is no obstacle in the way of the condemnation of the title to the fee of the land in this cemetery.

The order should therefore be affirmed, with costs.

**PUBLIC USE.** — What is a public use is an unsettled question; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756; but the general principle is, that public use and public benefit are convertible terms: *Aldridge v. Tusculum R. R. Co.*, 2 Stew. & P. 199; 23 Am. Dec. 307; *Olmstead v. Camp*, 33 Conn. 532; 89 Am. Dec. 221. See also notes to *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 686-707; *Fellowes v. New Haven*, 26 Am. Rep. 457-462. The legislature is not the exclusive judge of what is a public use in such cases, but its determination in that respect is subject to the control of the judiciary; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694; 23 Am. Dec. 756. Accordingly a statute authorizing certain rural cemetery associations to acquire land by exercising right of eminent domain was held to be unconstitutional and void, for the reason that the use was a private one: *Matter of Deansville Cemetery Ass'n*, 66 N. Y. 569; 23 Am. Rep. 86.

**EMINENT DOMAIN, WHAT SUBJECT TO.** — No property is exempt from the power of eminent domain, and therefore property already devoted to public uses may be taken: See pp. 139 and 142 of note to *Appeal of Sharon Railway Co.*, 9 Am. St. Rep. This principle is frequently applied where the property of one railroad is taken for the benefit of another: *Toledo etc. R'y Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564; 4 Am. St. Rep. 875; *Appeal of Pittsburg Junction R. R. Co.*, 122 Pa. St. 511; 9 Am. St. Rep. 128; and numerous cases cited in the note to *Appeal of Sharon R'y Co.*, 9 Am. St. Rep. 143. But land already devoted to a public use cannot be taken without express statutory authority: See note to *Grand Rapids etc. R. R. Co. v. Grand Rapids and Indiana R. R. Co.*, 24 Am. Rep. 551, and to *Appeal of Sharon R'y Co.*, 9 Am. St. Rep. 143; unless the appropriation is such as will not essentially injure or interfere with the public use to which the property is devoted: See note to last-named case, page 144. In *Evergreen Cemetery Ass'n v. City of New Haven*, 43 Conn. 234, 21 Am. Rep. 643, it was held that a municipal corporation cannot, without special authority given by statute, or by necessary and reasonable implication, take for a highway the lands of a cemetery; but as the cemetery in that case was a public one, and the taking was not necessary for the purposes of the improvement, it does not in any way conflict with the principal case.

## QUINLAN v. PROVIDENCE WASHINGTON INS. CO.

[123 NEW YORK, 356.]

**INSURANCE. — THE POWERS POSSESSED BY AGENTS OF INSURANCE COMPANIES,** like those of agents of any other corporations or of an individual principal, are to be interpreted in accordance with the general rule of agencies. No other or different rule is to be applied to a contract of insurance than is applied to other contracts. An agent of an insurance company possesses such powers only as have been conferred verbally or by instrument of authorization, or such as third persons have a right to assume that he possesses.

**PRINCIPAL AND AGENT. —** If one who is dealing with an agent knows that he is acting under circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, whether the agent is general or special, because principals may limit the authority of one as well as of the other.

**INSURANCE — LIMITATION UPON THE POWER OF AGENTS. —** If a policy of insurance declares that no officer or agent shall have power to waive any provision or condition embraced in a printed and authorized policy, but may waive certain added conditions, provided such waiver is written upon or attached to the policy, an attempted waiver by an agent of one of the conditions which the policy declares he shall not have power to waive is inoperative and void.

**INSURANCE. — THE FAILURE OF THE ASSURED TO READ HIS POLICY, OR HIS ABSENCE OF ACTUAL KNOWLEDGE** of the limitations on the power of agents contained therein, is immaterial. The limitations and conditions in the policy are part of the contract which the assured is bound to take notice of, and his ignorance of them cannot be excused on the ground that he had made arrangements with an agent of the insurer to take charge of his insurance interests.

**INSURANCE CONDITIONS, WAIVER OF BREACH OF. —** A breach of condition contained in a policy of insurance, requiring the assured to give notice of any suit to foreclose a mortgage or of any loss, and to make proofs of loss within a specified time, is not waived when the agent of the insurance company, having knowledge of the facts, informs the insured, after a loss has been sustained, that the company is attending to it and that it can be collected, if the policy declares that no agent or officer shall have power to waive a breach of such conditions.

**ACTION** upon a policy insuring the dwelling-house of the plaintiff against loss by fire. The policy was issued by one Kelsey, then an agent of the defendant, with power to counter-sign and issue policies. The policy was in the standard form containing the printed conditions prescribed by the act of 1886, and was dated July 12, 1887, and it contained the conditions and limitations referred to in the *syllabus*. In May, 1889, a suit was commenced for the purpose of foreclosing a mortgage made by the plaintiff after the issuing of the policy, and about twenty days after the institution of this suit, the premises were destroyed by fire. The defendant was not given any

notice of the foreclosure suit. In August, 1888, some ten months before the fire, Kelsey had ceased to be the agent of the defendant. On July 19, 1889, thirty-three days after the fire, Kelsey wrote a letter to the defendant, advising it of the existence of the risk upon the property, to which the defendant replied that the matter already "had our attention." Kelsey's letter was not written on behalf of the plaintiff, nor with his knowledge, but a month after it was written he was informed of it by Kelsey, and of the reply which the company had made, and Kelsey also said "he thought it would be all right; that he could collect it." Proofs of loss were not received by the company until January 8, 1890, seven months after the fire, though the policy contained a provision that in case of fire the "insured shall give notice of any loss thereby in writing to the company, and within sixty days after the fire, unless such time is extended in writing by this company, shall render the statement to this company in writing, signed and sworn to by the assured," which statement shall contain certain particulars enumerated in the policy. The company refused to accept proofs of the loss when received. The plaintiff testified that he did not read the policy nor did he have any knowledge of its conditions. Evidence was offered on behalf of the plaintiff tending to show that Kelsey knew of the commencement of the foreclosure proceedings, and told plaintiff that no harm could come to him thereby, but this evidence was rejected by the court, which at the close of the case directed that a nonsuit be entered.

*D. G. Griffin*, for the appellant.

*A. H. Sawyer*, for the respondent.

ANDREWS, J. If the rights of the parties depend upon the contract of insurance as expressed in the policy, there can be no hesitation in affirming the judgment of nonsuit.

The provision as to the commencement of foreclosure proceedings, the requirement that the insured, in case of loss, shall give immediate notice in writing to the company, and the other requirement, that within sixty days after a fire he shall render to the company a sworn statement of the particulars specified, are conditions precedent to a right to recover on the policy, and each of the three conditions mentioned was violated. Foreclosure proceedings were commenced, to the knowledge of the insured, before the fire; no notice of loss

was served at any time by him, and the letter of Kelsey to the company, written thirty-three days after the fire, even if it could be treated as having been written in behalf of the insured, was not immediate notice; and finally, the proofs of loss were not served until months after the sixty days' limitation in the policy had expired. The authorities are conclusive that the non-performance of these conditions, or any one of them, constituted a complete defense to a claim to recover on the policy as printed: *Inman v. Western Fire Ins. Co.*, 12 Wend. 460; *Blossom v. Lycoming F. Ins. Co.*, 64 N. Y. 162; *Titus v. Glenn Falls Ins. Co.*, 81 N. Y. 411.

The plaintiff was driven to the claim that the company had waived the right to insist upon the conditions of the contract as contained in the policy, or had consented to be bound, notwithstanding the violation of the conditions. He relied, to establish this contention, upon certain transactions between himself and Kelsey, the agent who acted for the company in making the contract of insurance and issuing the policy, fully recited in the statement of facts. It is to be assumed that Kelsey learned of the commencement of the foreclosure proceedings, and thereupon assured the plaintiff that his rights under the policy would not be prejudiced thereby; also that he knew of the fire when it occurred, and after writing the company the letter of July 19, 1889, informed the plaintiff that he had done so, and that he need take no further steps towards giving notice or securing proofs of loss, and it is to be admitted also that the plaintiff had not read the policy, and did not know what conditions it contained.

It is insisted that, upon the whole evidence, a question was presented for the jury, whether the company had waived the conditions relied upon to defeat a recovery or had consented to be bound notwithstanding their violation. The transactions and interviews between Kelsey and the plaintiff took place after Kelsey had ceased to act as the agent for the defendant; but it is claimed that the plaintiff did not know that his agency had terminated, and we shall consider the case upon the assumption that the company was bound by his acts to the same extent as if there had been no change in his relation to the defendant. The substance of the claim made by the plaintiff is, that the agent of the company, invested with the power to make contracts of insurance and issue and counter-sign policies, may subsequently change or modify conditions therein and waive forfeitures; in short, that in respect to

policies issued by him he stands in place of the company, and may do whatever the company itself might do in the premises.

The powers possessed by agents of insurance companies, like those of agents of any other corporations or of an individual principal, are to be interpreted in accordance with the general law of agency. No other or different rule is to be applied to a contract of insurance than is applied to other contracts. The agent of an insurance company possesses such powers, and such powers only, as have been conferred verbally or by the instrument of authorization, or such as third persons have a right to assume that he possesses. Where the act or representation of the agent of an insurance company is alleged as the act of the principal, and therefore binding upon the latter, the test of the liability of the principal is the same as in other cases of agency. No principle is better settled in the law, nor is there any founded on more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other: *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 10.

The limitations upon the authority of Kelsey were written on the face of the policy. It declared that "no officer, agent, or representative of the company should have power to waive any provision or condition" embraced in the printed and authorized policy, but power is given to agents to waive added provisions or conditions, provided such waiver is written upon or attached to the policy. Where a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority, and the consent or act of the agent not so indorsed is void: *Walsh v. Hartford Fire Ins. Co.*, 73 N. Y. 10; *Marvin v. Universal Life Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657. The conditions violated in this case were contained in the authorized blank, and as to these, the agent had no power in any manner, in writing or otherwise, to waive them.

In determining the question of liability in this case, it is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limi-

tations of the power of Kelsey. The conditions and limitations were a part of the contract, and he was bound to take notice of them, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy, and his arrangement with Kelsey to take charge of his insurance interests was a matter with which the defendant had no concern.

The act (chapter 486 of the laws of 1886), providing for a uniform policy known as the standard policy, and which makes its use compulsory upon insurance companies, marks a most important and useful advance in legislation relating to contracts of insurance. The practice which prevailed before this enactment, whereby each company prescribed the form of its contract, led to great diversity in the provisions and conditions of insurance policies, and frequently to great abuse. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage, and often so printed as almost to elude discovery. Unconscionable defenses based upon such conditions were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the law of contracts. Under the law of 1886 companies are not permitted to insert conditions in policies at their will. The policies they now issue must be uniform in their provisions, arrangement, and type. Persons seeking insurance will come to understand to a greater extent than heretofore the contract into which they enter. Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. The principle that courts lean against forfeitures is unimpaired, and in weighing evidence tending to show a waiver of conditions or forfeitures, the court may take into consideration the nature of the particular condition in question, whether a condition precedent to any liability, or one relating to the remedy merely, after a loss has been incurred. But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power; nor is there any reason why courts



should refuse to enforce forfeitures plainly incurred, which have not been expressly or impliedly waived by the company.

The acts and representations of Kelsey, upon which the plaintiff relies, were in excess of his authority as expressed in the policy, and did not bind the defendant, there being no evidence upon which it can be held that the company had enlarged his powers or waived the violated conditions.

These views lead to an affirmance of the judgment.

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**POWERS OF INSURANCE AGENTS.** — The extent of the authority of insurance agents is to be determined by the same rules that control in respect to other agencies; and if the insured has notice that the authority is limited, under no circumstances can the company be bound beyond its actual limits: *Weidert v. State Ins. Co.*, 19 Or. 261; 20 Am. St. Rep. 809.

**THE ASSURED MUST BE PRESUMED TO HAVE NOTICE OF THE RESTRICTIONS** in the policy: *Cleaver v. Traders' Co.*, 65 Mich. 527; 8 Am. St. Rep. 908; *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15; 19 Am. St. Rep. 118. An insurance company cannot limit its capacity to contract by general stipulations against waiver of conditions: *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233, and cases cited in the opinion. So a condition in a policy that no act of any agent of the company, other than its president or secretary, shall be construed as a waiver of a full and strict compliance with all the provisions of the policy is ineffectual: *German Ins. Co. v. Gray*, 43 Kan. 497; 19 Am. St. Rep. 150.

**POWER OF AGENTS TO WAIVE FORFEITURES.** — On this subject the authorities are quite irreconcilable: See note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 234. This conflict of opinion is obviously due to the fact that courts "lean against forfeitures" in the case of insurance policies as well as of other contracts: *Springfield etc. Ins. Co. v. McLimans*, 28 Neb. 846; and from the application of so vague a principle it is hopeless to expect anything but inconsistency and confusion in this part of our jurisprudence. Some order might be introduced into this chaos by the interference of the legislature, and in many of the states tentative efforts have been made in this direction. Unfortunately, the policy of these statutes has been different, — some of them favoring the companies, others the insured. The "standard policy" prescribed in New York, while it undoubtedly serves the beneficial purpose of enabling the assured to understand more clearly the precise nature of his contract, must also have the effect of limiting the number of cases in which agents can be held to have the power of waiving forfeitures. The opposite tendency is exemplified in the insurance laws of Maine, which render null and void a condition in a fire insurance policy that no act of any agent of the company, other than its president or secretary, shall be construed as a waiver of a full and strict compliance with all the provisions of the policy: *Day v. Dwelling House Ins. Co.*, 81 Me. 244.

**ANOTHER OBSTACLE TO SECURING UNIFORMITY** in this department of our jurisprudence is the difficulty of deciding who is a general and who a special agent, under all the infinitely various combinations of facts which are presented for review. Clearly, to call an agent "general" will not necessarily make him so for all purposes: *Marvin v. Universal etc. Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657. The most reasonable rule would seem to be that the

power to waive performance of a provision in a policy can only be exercised in the mode prescribed, unless it can be shown that the agent, whose acts are alleged to amount to a waiver, possesses actually or apparently the power of his principal in respect to the provision alleged to have been waived, and that the assured, who alleges that the condition has been waived in some way not specified in the policy, must show that the agent had power to make such a waiver: *Messelback v. Norman*, 122 N. Y. 578. Compare *Putnam T. Co. v. Fitchburg etc. Ins. Co.*, 145 Mass. 265. By such a rule, the rights of both the parties to the contract are adequately protected. But in no case will an agent, who has no knowledge of the breach of the condition of a policy, be deemed to have waived the forfeiture by statements not intended to have that effect, unless conditions exist which constitute an estoppel: *St. Paul etc. Ins. Co. v. Parsons*, 47 Minn. 352.

The rule stated in the note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 234, regarding the validity of a policy where the breach of conditions has occurred before its issue, is further recognized in the following cases: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121; *Bartlett v. Firemen's Fund Ins. Co.*, 77 Iowa, 155; *Springfield etc. Ins. Co. v. McLimans*, 28 Neb. 846; *Cross v. National etc. Ins. Co.*, 132 N. Y. 133. As to oral waiver of the proofs of loss by an adjusting agent, see, in addition to the cases given in the note just mentioned, *East Texas Ins. Co. v. Brown*, 82 Tex. 631; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 19 Am. St. Rep. 326.

## WALSH v. MUTUAL LIFE INSURANCE COMPANY.

[183 NEW YORK, 408.]

**INSURANCE, LIFE — INTEREST OF CHILD OF THE ASSURED.** — Under a policy of insurance on the life of the insured, "for the sole use of his wife if living, and if not living, to her children or their guardian," no interest vested in the children during the life of their mother, but upon her death, in the lifetime of the assured, all her children then living acquired an interest in the policy, and upon the subsequent death of the assured, the persons entitled to the insurance are the children living at the death of the mother, and in the event of the death of any of them after her death and before that of the father, the heirs of the child so dying are entitled to his or her portion of such insurance.

*Franklin M. Danaher*, for the appellant.

*Julien T. Davies*, for the respondent.

GRAY, J. The complaint sets forth the issuance by the defendant of a policy of insurance, whereby it insured the life of Traub, for the sole use of his wife Rica, in a sum named, and promised to pay the amount to her, as the assured, "if living, in conformity with the statute, and if not living, to her children or their guardian," etc. It further showed these facts, namely, that at that time the Traubs had three children living;

that Bessie, a daughter, died first, intestate, and leaving a husband and children; then the wife died; then Solomon, a son, died intestate, and leaving a widow and children; and finally, Traub died. Carrie, a daughter, alone survived, and one third of the policy was paid by the company to her. Another third was paid to the administratrix of Solomon, who had died intermediate his mother and father. The plaintiff took an assignment from Carrie and from Solomon's administratrix of their interests in the policy and claims, as their assignee, to be entitled to the remaining one third of the policy. The defendant demurred to the complaint, for insufficiency of facts to constitute a cause of action, and the question presented is, Did Bessie, the first child who died, have such an interest in this policy as survived her decease, and upon the mother's death, vested in her personal representatives? or did all interest in the policy, upon the death of the wife of Traub, vest at once in the two children surviving her? Another aspect of the question which the plaintiff presented is this: assuming that all interests settled in the two surviving children upon their mother's death, was it, nevertheless, conditional upon their both surviving their father, so that by Solomon's death his interest was lost, and Carrie, who survived all, had the sole claim to the insurance moneys?

At the special term the judgment went for the plaintiff; but at the general term the decision was the other way, and two of the learned justices thought that Bessie, who had predeceased her mother, had an interest in the policy, which, upon her death, passed to her personal representatives. We feel constrained to differ with the learned general term justices and to uphold the plaintiff's appeal. If we were at liberty to treat this question at first hand and as altogether an original one in this court, I should say that the arguments to sustain the judgment of the general term are cogent, and not easily overcome. Certainly they have a moral support in equitable considerations. But if we are to be guided in the disposition of the cases which come before us by the principle *stare decisis*, then we must adhere to views which have been held and assented to within recent decisions. In the case of *United States Trust Co. v. Mutual Benefit Life Ins. Co.*, 115 N. Y. 152, the plaintiff sued as the guardian of certain grandchildren of the assured. The policy was upon the life of Finn for the sole use of his wife, and in case she should die before him, the amount was payable to their children or to their guardian.

The wife first died, and their three children survived her; but two of them pre-deceased Finn, their father. The plaintiff claimed that the children of a child who had died after the mother were entitled to receive among them an equal one third of the policy. The decision was against their right to take anything under the policy. It was held that as grandchildren were not named in the contract, for that reason they could not be regarded as having been assured. Judge Earl, in the opinion, with respect to the nature of the interests which settled in the assured under such a policy, spoke in such wise as to cover this case. He said: "When she [referring to Mrs. Finn] died before her husband, the only persons interested in the policy were her children then living, and the whole policy, as a chose in action, belonged to them. They held vested interests therein, as they could in any other chose in action payable at a future time." This expression seems very authoritative; for although the question presented and decided was whether grandchildren could acquire any interest, and although all the children in that case happened to survive the wife, nevertheless, the learned judge passed upon the nature of the interest of children in such a policy, and used very precise and exclusive language in that respect. With that opinion all the members of the court concurred.

While referring to the opinion in that case, I may add that the concluding remarks of the learned judge need not embarrass our conclusion here. He said: "If we are wrong in this construction, . . . then . . . the policy was payable to her children as a class, and those of the class would take who were in being at the time when the policy became payable." That was not the decision, and it was not intended to be the expression of an opinion upon the case, otherwise than that in no event could grandchildren take, inasmuch as, upon an assumption that the court was in error in what had been held, the only alternative was the proposition stated. It was at once illustrative of the unsoundness of the plaintiff's claim, and at the same time, reasoning deductively, in further exclusion of the possibility of any interest having vested in the children at the time the policy issued. Previously, in *Anderson v. Goldsmidt*, 103 N. Y. 617, the same judge had delivered the opinion of the court; a case where wife and husband had joined in an assignment of a policy issued in her favor, and in case of her death before him, making the amount of insurance payable to her children. The wife defended against the

suit of the assignee, on the ground that she was a married woman, with children having an interest in the policy. The plaintiff's recovery was upheld, and it was there said that the interest of the children was contingent, and that the contingency did not arise which gave them any interest whatever in the policy. We have, therefore, in these two recent cases, authoritative opinions that children have none other than a contingent interest in a policy issued in such a case, and do not become actually vested with an interest, unless the wife die before the termination of the life insured against, and they survive her; and as the contract then is one with her children, only those who answer, at that time, that description acquire an interest in the policy. Only in such an event would there arise a distinct class of beneficiaries under the contract of insurance.

Some stress is laid upon the remarks of Judge Finch in the case of *Whitehead v. New York Life Ins. Co.*, 102 N. Y. 143, 55 Am. Rep. 787, decided very shortly before the *Anderson* case.

That was a case where the insurance was upon the husband's life, and in favor of his wife, or her personal representatives, with a provision that in case she died before him, the insurance should vest in the children of the insured. The wife died, and the husband surrendered the policy to the company in consideration of sums paid to him for the surrender. The children then sought to have the surrender set aside and the policies reinstated as subsisting obligations of the defendant company. Their action was sustained. Judge Finch, in his opinion, speaks of the interest in the policy as one which was vested in the wife, "and one also in the children." What he meant, however, is explained by his subsequent observation, that it was an interest which vested in wife and children, "as the assured, under the provisions of the statute"; referring to the act of 1840 (Laws 1840, c. 80), which was passed as a provision for orphanage and widowhood, and authorized the issuance of policies insuring a man's life in favor of his wife, and also to provide, by their terms, for the payment of the insurance moneys to children in case of her decease before that of her husband. The opinion is not authority for the proposition that an interest vested in the children upon the issuance of the policy in favor of the wife which could not be lost or divested by their death before their mother as the assured. It decided that by force of the act of 1840, such a policy, in

favor of the wife, and in case of her death made payable to her children, vested an interest in the children, which, upon the happening of the contingency named, conferred upon them the rights of ownership, and without their assent it could not be surrendered nor released. That was the decision called for by the case before the court. In a certain sense, upon the issuance of the policy, such an interest in or right to its continuance as an obligation did vest, or, more properly, inure to her children. It did not vest in the technical sense of the term, as it is used in connection with estates created under testamentary devises; but the interest was such as that when the contractual relation with the mother ceased by her death, they who were her children could, by the terms of the contract with the company, as authorized by the statute, assert and enforce it for their protection as substituted parties in the place of the first assured. That such a meaning is to be attached to Judge Finch's remarks seems evident from the fact that Judge Earl, in his opinion in the United States Trust Company's case, *supra*, cites the Whitehead case as an authority, and had the opinion fresh in his mind when delivering the opinion in the Anderson case. In a case recently decided by the supreme court of Pennsylvania, where the policy was issued by a New York company, and was in favor of the wife, and in case of her death, the insurance was payable to her children, the court construed the policy to be an obligation which made the insurance money payable to her if she survived her husband, "but if she did not, it was payable to her children then living."

That case was decided in 1889, the same year as was the trust company's case, *supra*, and seems a strong illustration of the force of the proposition as to the contingent nature of the children's interest in the policy, in that it impressed itself similarly upon the minds of the members of the two courts.

I do not think there is any reason for or that we should resort to the rules which obtain in cases where the question relates to the vesting of estates created by will, and depends upon the construction of the language of the testamentary devise. A will is in no sense a contract, and an insurance policy is: *St. John v. American Mut. L. Ins. Co.*, 13 N. Y. 31; 64 Am. Dec. 529; *Olmsted v. Keyes*, 85 N. Y. 593. In the endeavor to effectuate the intention of a testator, courts are allowed a greater latitude of action, within settled rules, than when the subject of their consideration is a contract between parties.

In the one case courts will go far to avoid a construction which defeats an intention, apparent from a consideration of the whole will and of the circumstances surrounding its making, that the issue of children who may have pre-deceased the testator, or an event mentioned for the determination of some suspension of the estate, shall share in a general provision for the testator's family. Presumptions of an intention, that all who could naturally be regarded as objects of his regard are comprehended, will be permitted to influence and guide construction, whenever possible, without conflict with plain provisions in the will. But in the case of a contract, where the minds of the contracting parties have met, and which is supposed to resume their purposes and to contain their agreements, construction may not be so liberal as to permit a departure from a precise and strict conformity with its terms, if compliance is possible. Mr. Story, in his work on contracts (sec. 639), laid down this rule of construction: "If its language is neither uncertain nor ambiguous, it is to be expounded according to its apparent import, and is not to be warped from the ordinary meaning of its terms, in order to harmonize with uncertain suppositions, in regard to either the probable intention of the parties contracting, or to the probable changes which they would have made in their contract had they foreseen certain contingencies."

As a contract, then, the provisions of this policy are to be construed as contracts ordinarily are construed. They should be read and enforced, if unambiguous, according to the plain meaning of the words used. This policy, in the respect we are considering, used clear and definite words. The defendant contracted with the wife of Traub, and assured her thereby of a certain payment, in the event that she survived her husband, and the parties further agreed that if she failed to live till then, the payment was to be made to her children or their guardian. The ordinary meaning of the word "children" is indisputable, and the more reasonable ambiguity to be supposed would consist in whether it was only that child or those children who should survive the father who would be entitled to claim payment under the policy. But this difficulty is removed by authority and upon reasoning. If others than her children were to benefit by the insurance, it was quite possible to write them into the contract; but here definite parties are named as substitutive beneficiaries. The instant the mother died, those who answered the description of her children be-

came the parties assured by the policy. The personal representatives of the child, who had pre-deceased the wife, could not be substituted as parties to a contract, which expressly describes "children." At any rate, by parity of reasoning, if grandchildren, in the trust company's case, could not take because not named in the policy, how can executors or administrators take if they are not named? and upon the authority of those cases which declare the interest of children to be contingent during their mother's lifetime, how could the child who had pre-deceased Mrs. Traub have possessed an interest which she could transmit to her personal representatives, and which they could assert under such a contract? I think the conclusion must be reached, that, upon the death of Traub's wife, her children living at that time became vested with every right and interest in the policy.

In the case supposed by one of the learned justices at the general term, of the death of all of the children before the mother, and then of her pre-deceasing her husband, we have authority for suggesting that the obligation of the insurer would be enforceable by the personal representatives of the husband, if he had not administered upon it: *Olmsted v. Keyes*, 85 N. Y. 593.

In such a case, if all the children had died before their mother, their interest in the policy would be solely in her, and upon her death, like any other chose in action, would pass to her husband. If he should not make any disposition of it with the company during his lifetime, his personal representatives would have the right to administer upon it.

It is needless, however, to discuss or decide upon the supposed case. It is sufficient to say that such an obligation of the insurance company could not fail for the want of a payee, in any contingency that I can conceive of.

The views expressed lead to the conclusion that the judgment of the general term should be reversed, and the judgment entered upon the interlocutory judgment at the special term should be affirmed, with costs at the general term and in this court.

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A POLICY OF INSURANCE UPON THE LIFE of a husband for the benefit of his wife if she survives him, or of his children if she dies before him, creates no vested interest in the wife, and therefore she cannot assign the policy, either alone or in conjunction with her husband, so as to give an assignee a valid claim to its proceeds: *Connecticut etc. Ins. Co. v. Burroughs*, 34 Conn. 305; 91 Am. Dec. 725; *Brown's Appeal*, 125 Pa. St. 303; 11 Am. St.



Rep. 900. Where a policy is made payable to the wife and children without any condition added, it is an irrevocable settlement in favor of all of them, and the wife and husband cannot assign a greater interest than the wife's proportionate share: *Connecticut etc. Ins. Co. v. Baldwin*, 15 R. L. 104. Nor, *a fortiori*, can the husband alone assign such a policy to the prejudice of the beneficiaries: *Robinson v. Duvall*, 79 Ky. 83; 42 Am. Rep. 308. As to the creation of a vested interest in the beneficiaries designated by the policy, see *Hooker v. Sugg*, 102 N. C. 115; 11 Am. St. Rep. 717, and extended note thereto. Further illustrations of the same principle will be found in the recent cases: *Putnam v. New York Life Ins. Co.*, 42 La. Ann. 739 (a wife); *Hewlett v. McHargy*, 74 Md. 350 (daughters). The character of the interest acquired by the beneficiary, however, depends to a great extent on statutory provisions regulating this class of life insurances. Thus in Wisconsin, in the absence of a statute, it is held that one who has procured a policy of insurance on his own life for the benefit of another, and paid the premiums thereon as they become due, may dispose of the insurance money by will, to the exclusion of the beneficiary named in the policy, during the lifetime of such beneficiary: *Estate of Breitung*, 78 Wis. 33.

## SCHILD v. CENTRAL PARK, NORTH AND EAST RIVER RAILROAD COMPANY.

[133 NEW YORK, 446.]

**STREETS.** — RAILROAD COMPANY AUTHORIZED TO PUT DOWN ITS RAILS upon a street is under obligation to so construct and maintain its track as that, by the exercise of reasonable care and supervision with respect to them, no damage might be occasioned to the public in the use of the highway. The street must be maintained as nearly as possible as fit for the use of the public who travel on foot or in vehicles as it was before, having due regard to the necessity for rails being there.

**JURY TRIAL** — QUESTION FOR THE JURY. — Whether rails in a public street are so laid as to constitute neglect on the part of the corporation maintaining them of proper conditions for the public safety is a question of fact for the jury, and not one of law for the court to pass upon.

**STREET-RAILWAY COMPANY'S LIABILITY TO PERSON STUMBLING UPON ITS RAILS.** — Where there is evidence tending to show that the rails maintained in a public street by a street-railway corporation were maintained at a dangerous elevation above the surface of the street, in consequence of which a foot-passenger tripped and fell, and therefrom suffered personal injury, it is for the jury to determine whether the corporation had been neglectful of the right of the public to as safe and unobstructed a use of the street as was reasonably possible under the circumstances, and if the jury finds that the corporation was neglectful of such right, to the injury of the plaintiff, he is entitled to recover.

**ACTION** to recover for injuries suffered by plaintiff from stumbling and falling when crossing defendant's track at the intersection of Wall and Front streets in the city of New York. The evidence on behalf of the plaintiff tended to show that his

fall was the result of his tripping against a rail of the track. There was a depression in the flagstone at the crossing inside of this rail, and a claim was made on behalf of the defendant that plaintiff's fall was occasioned by his stumbling into this hole. The judge instructed the jury that if the fall was solely attributable to the presence of this hole, the defendant was not answerable, because the duty rested primarily upon the city to see that its streets were kept safe and secure, but that if the condition of the rail was the cause of the plaintiff's fall, or the rail was improperly maintained, then the jury would be justified in imputing negligence to the defendant, though the hole may also have contributed to produce the injury to the plaintiff. A verdict was returned by the jury in favor of the plaintiff, upon which a judgment was entered in the trial court, and this judgment on appeal to the general term was by it affirmed.

*Henry Thompson*, for the appellant.

*Charles J. Patterson*, for the respondent.

GRAY, J. I think the instructions given by the trial judge were correct, and fairly left it to the jury to pronounce, upon the evidence, what they believe to have been the obstruction to plaintiff's passage over the track. Their verdict must be taken as establishing, conclusively for us, that the plaintiff stumbled over the rail, and not because of the hole in the flagging. The question, therefore, becomes one which relates to the rights of the defendant, and to the duty resting upon it with respect to the laying and maintenance of its rails upon the street surface. The evidence for the plaintiff and for the defendant conflicts as to the height of the rail above the surface of the street. It was either one inch and an eighth of an inch, or upwards of two inches. There was evidence for the defendant that the track, when laid some ten years previously, was level with the street; but the rails certainly were, at the time of this occurrence, at some height above the street surface, and, to some extent, constituted an obstruction in the highway.

The defendant was authorized and had the right to put down its rails in and upon the street, and was under no liability, by reason of anything in the grant from the common council, to keep the street pavement between its tracks in repair. But it was under an obligation, which is necessarily

implied as to every use of a highway, so to construct and to maintain its tracks as that, by the exercise of a reasonable care and supervision with respect to them, no danger might be occasioned to the public in its use of the highway.

From the case of *Rex v. Kerrison*, 3 Maule & S. 526, upon which the decision in *Oliver v. North Eastern R'y Co.*, L. R. 9 Q. B. 409, was rested, the principle may be deemed to have been established, that a railroad corporation having its rails in a public highway must lay and keep them so as to cause as little injury as possible. The highway or street used for the rails must be maintained, as nearly as possible, as fit for the use of the public, who travel on foot or in vehicles, as it was before, having due regard to the necessity for the rails being there. Whether the rails are so laid as to constitute on its part a neglect of proper conditions for the public safety is a question of fact for the jury, and not one of law for the court to pass upon. It was the province of the jury to decide, in such a case, whether the defendant was negligent. It is not a question of the right of the defendant to be there with its rails in the street; there was only the question whether, in the way or in the condition in which it suffered its rails to remain, it was not neglectful of the right of the public to as safe and unobstructed a use of the street as was reasonably possible under the circumstances.

That the evidence showed that no complaint had ever been made, lodged, or recorded, to the knowledge of the defendant, or with the public authorities, does not affect the question of liability. It was something for the jury to consider in rendering a verdict. It may or may not have seemed singular. Many may have fallen from the same cause without injury ensuing; or, if injured, without complaining or suing.

This discussion sufficiently covers the points presented for the appellant, and there being no errors calling for a reversal, the judgment should be affirmed, with costs.

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RAILROAD COMPANIES MUST KEEP STREET OR HIGHWAY CROSSINGS IN A SAFE CONDITION, when they have changed or altered them to suit their own convenience: *Louisville etc. R. R. Co. v. Phillips*, 112 Ind. 59; 2 Am. St. Rep. 155; *Terre Haute etc. R. R. Co. v. Clew*, 123 Ind. 15; 18 Am. St. Rep. 303; *Missouri P. R'y Co. v. Bridges*, 74 Tex. 520; 15 Am. St. Rep. 856. In *Tetherow v. St. Joseph etc. R'y Co.*, 98 Mo. 74, 14 Am. St. Rep. 617, this rule was applied to a case where the rails had been left several inches above the road-bed and traveled way of the street, and a person attempting to cross in a wagon, and using due care, was thrown out and killed.

**WRONKOW v. OAKLEY.**

(133 NEW YORK, 505.)

**HUSBAND AND WIFE. — A WIFE MAY APPOINT HER HUSBAND HER ATTORNEY IN FACT** if the statute authorizes her "to execute, acknowledge, and deliver her power of attorney, with like force and effect, and in the same manner, as if she were a single woman."

**HUSBAND AND WIFE — POWER OF ATTORNEY, WHEN AUTHORIZES RELEASE OF DOWER. — A power of attorney from a wife to her husband, purporting to authorize him to grant, bargain, sell, and convey all lands belonging to her individually and jointly with others, and for the purpose aforesaid, and in her name to execute and deliver all necessary conveyances, releases of dower and thirds, or right of dower and thirds, or other instruments for conveying, surrendering, or relinquishing all or any part of her estate, right, title, or interest, whether vested or contingent, execute or inchoate, empowers him to execute in the name of his wife a conveyance of lands owned by himself, and therein and thereby to release her right of dower.**

**JUDGMENT LIEN. — WHEN, BY PROCEEDINGS UPON APPEAL, the lien of a judgment is suspended, such lien is released as to all property upon which the judgment could otherwise operate, including property acquired during the pendency of the appeal until the court orders the lien to be restored by redocketing.**

**APPLICATION** by a purchaser at a foreclosure sale to be relieved from his purchase on the ground that the interest of the wife of Moritz Bauer had not been conveyed. The property purchased had at one time belonged to Bauer, who had executed a conveyance thereof in his own behalf and in the name of his wife, acting as her attorney in fact, and it was claimed that the power was not sufficient to authorize Bauer to release his wife's right of dower. The material portion of the power appears in the *syllabus*. The trial court refused to release the purchaser, but its action was reversed by the general term on appeal.

*Henry A. Forster*, for the appellant.

*Richard S. Sweezy*, for the respondent.

**PECKHAM, J.** In relation to the questions arising upon this application of the purchaser Wolf to be relieved from his bid at the judicial sale, on the ground that the interest of the wife of Bauer had not been duly conveyed by virtue of her power of attorney to her husband, we are of the opinion that the order of the general term is erroneous, and for the reasons stated in the dissenting opinion of Mr. Justice Andrews at the general term.

The limitation sought to be imposed upon such power of

attorney, that it only authorized Mrs. Bauer's husband to sign her name to conveyances of lands belonging to her, is not, we think, sustained by the language of the instrument. Indeed, the learned judge who so held in his opinion at the general term, in order to arrive at his conclusion, rejects as surplusage the language of the power which authorizes the husband to convey for her and in her name, and as her act and deed to sign, seal, execute, acknowledge, and deliver all necessary releases of dower and thirds. He construes the language used in the first part of the power as confining its application to the execution of a conveyance of any and all lands belonging to Mrs. Bauer, and he says the words "releases of dower," subsequently used, have no relation to the power actually granted, and hence are surplusage.

We think, however, that the language as to "releases of dower" was used for the very purpose of authorizing the husband to do as he has done, and that the language of the first part of the power, when speaking of lands, etc., belonging to the wife, does not limit, and was not intended to limit, the operation of the words "releases of dower and thirds," so as to make them of no meaning or importance; but on the contrary, it was intended by their use to confer authority on the husband to release her inchoate right of dower in lands belonging to him. Indeed, she continues the statement of her purpose by inserting in the instrument a power to execute other instruments for the conveyance, surrendering, and relinquishing all or any part of her estate, right, title, and interest, whether vested or contingent, choate or inchoate therein. The language used in the first part of the power should not be held to operate all through it, and limit the otherwise plain meaning of the paper.

We think there is no objection to the title arising out of the power of attorney given by the wife to the husband. She had the right to execute a power of attorney under the act (chapter 300 of the Laws of 1878), and in executing such power she could appoint her husband her agent or attorney in fact.

As to the objection that certain creditors by judgment against Bauer were not made parties, nor the sureties on certain appeal bonds, we think a sufficient answer is made by the fact of the entry of the memorandum by virtue of section 1256 of the Code of Civil Procedure, "lien suspended on appeal." We think the meaning and purpose of the legislature in the enactment of that and the succeeding sections were to

release the lien of the judgment so suspended on appeal in regard to all property upon which it otherwise would become a lien until the court orders that it be restored by a redocket. The sureties, upon the first appeal to the general term, consented to the entry of the order, which did not, in terms, provide as to subsequently acquired property, but if we are right in our construction of the statute, it was not necessary to so state it in the order. The law itself provided for the fact. The sureties, upon a further appeal taken to the court of appeals, consented in terms to the order suspending the lien, including after-acquired property. Upon the affirmance of the judgment by the latter court, the sureties on the last appeal bond took an assignment of the judgments, and in their hands there was no longer any liability on the part of the sureties on the first appeal. Such sureties became, on the giving of the second undertaking to pay the judgments, sureties for the second sureties, and when the second sureties paid or discharged their obligation to the owner of such judgments and took an assignment of them, they could not enforce them against the first sureties. Under these circumstances there is no reason on this ground for releasing the purchaser from his bid.

The respondent here does not insist upon the objection that these questions were doubtful, and a purchaser ought not to be required to take such a title; but as we understand, if the questions above discussed should be decided in favor of the title, he is willing to take it, although those who are not parties here would not be legally barred by our decision from hereafter raising the question. As our decision depends upon the construction of statutes, the rule of *stare decisis* would be effectual as an answer to any further claim, and we think the purchaser entirely justified in his waiver.

Our conclusion is, that the order of the general term should be reversed, and that of the special term affirmed, with costs in all courts.

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**HUSBAND AND WIFE.** — Wife may appoint her husband her agent, by her power of attorney, to convey her inchoate interest in his real estate: *Wilkinson v. Elliott*, 43 Kan. 590; 19 Am. St. Rep. 158. So a power granted by a wife to her husband "to execute and acknowledge, sign, seal, and deliver any deed or deeds for the conveyance or assurance of all my right, title, and interest in and to any lands and tenements the title to which is in the said D. S. Munger, and in which I have any interest as being the wife of him," is sufficient to authorize the conveyance of her interest in any lands then owned

by D. S. Munger within the county where the power was recorded: *Munger v. Baldridge*, 41 Kan. 236; 13 Am. St. Rep. 273.

A WIFE HAS A TANGIBLE AND VALUABLE INTEREST IN THE ESTATE OF HER HUSBAND: *Nichols v. Nichols*, 61 Vt. 426. Where a married woman joins her husband as grantor in conveying lands in which she has no estate except a contingent right of dower, the deed, although it contains no clause relinquishing dower, will bar her right thereto, if she acknowledges it in proper form: *Johnson v. Parker*, 51 Ark. 419. A quitclaim deed to the heirs by the widow, when, by the law of the state, she is entitled to dower in the lands of her deceased husband, operates as a release of the dower right: *Debbertstein v. Murphy*, 44 Minn. 526.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**NORTH CAROLINA.**

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**WATSON v. SMITH.**

[110 NORTH CAROLINA, 6.]

**WILLS — EXECUTORY DEVISE — REMAINDER.** — A disposition of property by will is never construed as an executory devise when it is possible to give it effect as a remainder.

**WILLS — CONCURRENT CONTINGENT REMAINDERS.** — When property is devised to one for life, and at his death to his issue then living, or in default of such issue to a third person, concurrent contingent remainders are created for the use of such issue and such third person, the latter limitation to take effect only on the failure of the former to vest.

**THE ASSIGNMENT OF A CONTINGENT REMAINDER OR AN EXECUTORY DEVISE,** free from fraud or imposition and for a valuable consideration, will be upheld in equity, though void at law.

**AGREED** case involving the construction of a clause in the will of J. O. Watson, which read as follows: "Lastly, all the rest and residue of my estate, real and personal, not herein and hereby disposed of with effect, I do hereby devise and bequeath as follows: After paying all of my just debts, legacies, and funeral expenses, and the charges for settling my estate and executing this will, I give the whole unto my nephew, John W. B. Watson, to have and to hold to him and his use for and during the term of his life, and at his death the said estate, both real and personal, shall belong to such child or children of the said John W. B. Watson as may be living at his death, or the issue of any child who may pre-decease him. And if the said John W. B. Watson should die without issue living at his death, then the said estate, both real and personal, shall belong in fee-simple and be equally divided amongst George W. Watson, William H. Watson, Henry B.



Watson, and Owen L. Dodd, and their heirs forever." Judgment for the plaintiff, from which the trustee appealed.

*G. V. Strong*, for the plaintiff.

*F. H. Busbee*, for the defendant.

SHEPHERD, J. The particular provision in the will of J. O. Watson, the construction of which is involved in this controversy, is by no means a stranger to this court. In *Watson v. Watson*, 3 Jones Eq. 400, the court declared that the land, being limited by way of contingent remainder to persons not *in esse*, it had no power to order a sale for the purpose of converting it into more beneficial property. In *Watson v. Dodd*, 63 N. C. 528, it was held that the contingent interest of one of the devisees, expectant upon the death of the life tenant without issue, could not be subjected to the payment of his debts. The question now presented is, whether the interests of such devisees are assignable by deed, either in law or equity. The limitation was to John W. B. Watson for life, and at his death to such child or children of the said John as might then be living; but should he die without issue living at his death, then to be equally divided between George W. Watson, William H. Watson, Henry B. Watson, and Owen L. Dodd, and their heirs forever. What interests did these last-named persons take under the will? In the first of the cases above cited, it was said that the limitation was to John for life, with a contingent remainder to such of his children as might be living at his death, and that the persons above mentioned were to take by way of executory devise in the event of a failure of issue upon the death of the life tenant.

In the latter case it was suggested, though not decided, that the limitation to these persons was a contingent remainder. In this view, we entirely concur. An executory devise is strictly such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules in limitations in conveyances at common law, but it is never construed to be such if it is possible that it should take effect as a remainder: *Fearne on Contingent Remainders*, 368, 393. The limitation in question does not take effect after the limitation to the expectant issue, but upon the regular determination of the particular life estate, and therefore must be a remainder. It is true that the limitation to the issue is also a remainder in fee, and it is a rule of law that no remainder can be limited after a fee, but, as we have seen, the other limita-

tion is not expectant upon the determination of the estate limited to the issue, but upon the determination of the estate of the life tenant without issue.

In *Goodright v. Dunham*, 1 Doug. 265, the will was in these words: "I give my messuage, etc., to my son J. S. for life, and after his death unto all and every his children equally, and to their heirs; and in case he dies without issue, I give the said premises unto my two daughters and their heirs, equally to be divided between them." It was determined that "both devises were contingent remainders in fee." See also *Lodding-ton v. Kyme*, 1 Ld. Raym. 203; *Bannister v. Carter*, 3 Bro. P. C. 64. The case of *Goodright v. Dunham*, 1 Doug. 265, is exactly in point. As in our case, the limitation is of two concurrent fees by way of remainder as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, and it is called a limitation by way of remainder on a contingency with a double aspect.

In deference to the discussion of counsel, and in view of the apparently conflicting judicial utterances upon the subject, we have deemed it best to determine the precise character of the limitation, but we really do not see how it is essential to a proper disposition of this case. Taking the limitation to be either a contingent remainder or an executory devise, we are of opinion that the interest of George W. Watson and others was at least "a possibility coupled with an interest": *Watson v. Dodd*, 68 N. C. 528; and its assignment for a valuable consideration and free from fraud or imposition, while void in law, will be upheld in equity. In the above case, Pearson, C. J., seems to consider that it is an executory contract, which will be specifically enforced upon the happening of the contingency upon which the remainder is to vest. It is possible that he had in mind the assignment of a mere possibility, such as the expectancy of an heir at law, as in *McDonald v. McDonald*, 5 Jones Eq. 211; 75 Am. Dec. 434. In *Bodenhamer v. Welch*, 89 N. C. 78, it is held that such an interest may be assigned (we suppose that an equitable assignment is meant), and we are of the same opinion; but even if this were not so, it is clear that the assignment in question, if treated as an executory contract, may be specifically enforced against the assignors and their heirs, should the life tenant die without issue, and this is all that is necessary (according to the stipulations in the case agreed) to entitle the plaintiff to the relief he asks.

The plaintiff, the life tenant, has, by the assignment, acquired

an equitable right to the interest of the said remaindermen. He is a single gentleman, about eighty years of age, and the defendant is willing to take the risk of his marrying and leaving issue, provided the assignment of the remaindermen is effectual to bind them and their heirs. We have seen that such is its effect, and the judgment must be affirmed.

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**EXECUTORY DEVISE — REMAINDER.** — If a devise can take effect as a remainder, it will never be construed as an executory devise: *Mandersen v. Lukens*, 23 Pa. St. 31; 62 Am. Dec. 313; *Roach v. Martin*, 1 Harr. (Del.) 548; 27 Am. Dec. 748.

**EXECUTORY DEVISE — ASSIGNMENT.** — An executory devise is assignable: *Kean v. Hoefcher*, 2 Harr. (Del.) 103; 29 Am. Dec. 336.

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## MAXWELL v. BARRINGER.

[119 NORTH CAROLINA, 75.]

**TRUSTS — POWER TO SELL.** — Where a deed expressly declares on its back that the grantee holds the land conveyed thereby for the joint benefit of himself and another person named, and that it is to stand as security for certain notes and for the balance of the purchase-money paid by such other person, and that the profits realized above these sums shall be equally divided between the grantee and such other person, such declaration creates an express trust in the land for the benefit of such other person, or in the event of his dying intestate before the land is sold, for the benefit of his heirs at law; but it does not create a power of sale in the trustee, or impose such duties as could not be performed without such power, and a sale of the land by the trustee after the death of such intestate is void as against his heirs at law.

**CO-TENANCY — INTERESTS OF CO-TENANTS IN PROFITS OF LAND DESCENDIBLE TO HEIRS UNTIL CONVERSION.** — Co-tenants of land may agree that the profits, either before or after a sale of the land, shall be equally divided, subject to any charges that they may impose upon their respective interests; but until there has been a conversion, either legal or equitable, their interests retain the characteristics of real property, and as such is descendible to their heirs.

**TRUSTS — CO-TENANCY.** — **STATUTE OF LIMITATIONS** does not begin to run in favor of the trustee of an express trust in land, or in favor of a co-tenant, until there has been a demand for possession by the co-tenant or the *cetui que trust*, or those claiming under him, and a refusal to deliver by the co-tenant or the trustee in possession.

**APPEAL** by the defendant from a judgment in favor of plaintiffs.

*O. W. Tillett*, for the plaintiffs.

*P. D. Walker*, for the defendant.

**SHEPHERD, J.** The plaintiffs are suing as the heirs at law of F. H. Maxwell, and they pray that an account be stated, that certain land be sold, and that the proceeds be divided between them and the defendant according to their respective interests.

It is insisted by the defendant that the said F. H. Maxwell had no interest in the land that was descendible to the plaintiffs as his heirs at law, and that if he had such an interest it was converted into personalty by virtue of an alleged sale made by the defendant, and that he has fully accounted and settled with the administrator of said Maxwell for the proceeds of the same.

1. We will first consider the nature of the interest which F. H. Maxwell acquired by virtue of the writing indorsed under the hand and seal of the defendant on the back of the sheriff's deed. It is there expressly declared that the defendant holds the land for the joint benefit of himself and Maxwell, but it is "to stand as a security" for a note of \$1,486.69 and interest, given by Maxwell to the defendant, and also "to secure a note of \$300 to J. H. Wilson of this date, and then the land to stand for the balance of the purchase-money so paid and receipted for by said Maxwell."

We are very decidedly of the opinion that this vested an equitable estate in common in Maxwell, the land being charged with the payment of the indebtedness mentioned. It is true that it is provided that "if any profits are realized over and above these sums, the same are to be equally divided between [the defendant] and F. H. Maxwell," but we are unable to perceive how the addition of these words can have the effect of changing the character of such equitable estate. In view of the context, the word "profits" may well be construed to mean such surplus as may remain, should it be necessary to make a sale to satisfy the said indebtedness. The case of *Smith v. Walser*, 2 Barn. & C. 401, cited by counsel, is not in point. There A, a merchant, and B, a broker, agreed that the latter should purchase goods from the former, and in lieu of brokerage should receive for his trouble a certain proportion of the profits arising from the sale, and should bear a proportion of the losses. It was held that this did not vest in B any share in the property purchased or in the proceeds of it. Bailey, J., remarked that if A had agreed that B should have "that portion of the property itself, it would no doubt have become the joint property of the two." In our case, the land seems to have been purchased by the defendant Maxwell, and

and there is, as we have seen, a declaration of trust that the defendant is to hold the land for their joint benefit.

Neither does the case of *Sprague v. Bond*, 108 N. C. 382, apply. There, a grantee of an absolute deed orally agreed to sell the land and divide the profits with the grantor. The grantee sold the land, and it was held that oral testimony was admissible to prove the agreement in an action by the grantor for an account of the profits. The court at the same time declared that such an agreement could not, under the circumstances, be enforced as a trust against the land, because it was within the statute of frauds; but the sale having been voluntarily made by the grantee, a recovery was permitted because it related to the consideration only. The argument which assimilates this case to the one before us improperly assumes that Maxwell had no enforceable trust against the land, whereas we have seen that he had an equitable estate therein.

Parties owning land in common may agree that the profits, either before or after a sale, shall be equally divided, subject to any charges that they may impose upon their respective interests, but until there has been a conversion, either equitable or legal, their interests must necessarily retain the characteristics of real property, and as such be descendible to their heirs. There is certainly nothing in the declaration of trust that amounts to an equitable conversion; for even if a power of sale had been conferred upon the defendant trustee, there is nothing in the language used which, either expressly or by implication, makes it his imperative duty to sell, and "the equitable *ought* must exist before there can be any room for the operation of the maxim that equity regards that as done which ought to be done": 8 Pomeroy's Eq. Jur., sec. 1160; *Mills v. Harris*, 104 N. C. 626.

2. It is insisted, however, that there has been a legal conversion by reason of a sale made by the defendant. We think that his honor was warranted in instructing the jury that there was no sale to Jarvis Maxwell. First, we are of the opinion that the agreement did not vest in the defendant a power of sale. It is very evident that shortly after the transaction the parties did not themselves conceive that such a power existed, as they both joined in a deed conveying a part of the land which they had sold to one Selby. This, however, does not determine the legal question, but is only referred to as showing the natural construction that should be put upon such

very general language as that from which the power is said to be implied. It is true, as stated in *Perry on Trusts*, 766, that no particular form of words is necessary to create a power of sale. "Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without it, will necessarily create a power of sale in the trustee." We find no words here which show such an intention or impose such a duty. All that is said is, that "if any profits are realized over and above these sums, the same are to be equally divided," etc. Nothing is said about a sale, the time when it is to be made, or the terms thereof; and if we are correct in our construction, that Maxwell acquired an equitable estate charged with certain indebtedness, it would be analogous to a mortgage or trust to pay debts which clearly, in this state, could not be foreclosed under such vague language, but would require a decree of court. The cases of *Council v. Averett*, 95 N. C. 131, and *Foster v. Craige*, 2 Dev. & B. Eq. 209, cited by counsel, do not, in our opinion, sustain the contention of the defendant in favor of a power of sale.

Another reason in support of the ruling of the court may be found in the fact that there was really no sale to Jarvis Maxwell, as it is plain from the testimony that he bought the land under the direction and as the agent of the defendant; and if it be conceded that there was a delivery of the deed by the defendant to the said Jarvis (which is not at all free from doubt), and if the naked legal title vested for an instant in him before he reconveyed to the defendant, the latter would still take the land charged with the trusts. Even if a stranger had acquired the legal title with notice, he would take it subject to the trusts; *a fortiori* would the trusts be binding on the trustee who purchased indirectly at his own sale: *Howell v. Tyler*, 91 N. C. 207; *Fronberger v. Lewis*, 79 N. C. 428; *Sumner v. Sessoms*, 94 N. C. 371; *Gibson v. Barbour*, 100 N. C. 197.

3. It is further contended that although the defendant may have purchased at his own sale, it was only voidable, and that as the proceeds would be personalty, the administrator could ratify the sale, and that such ratification and subsequent settlement are a bar to the plaintiff's claim. If, as we hold, an equitable estate in the land descended to the plaintiffs, it cannot be seen how the administrator was entitled to the proceeds. It is sufficient to say, however, in answer to the propo-

sition, that there being no power to sell, the sale was void and not merely voidable, and therefore insusceptible of ratification by any one.

4. The defendant finally insists that the plaintiffs are barred by the statute of limitations. The defendant was the trustee of an express trust, and also an equitable tenant in common with the plaintiffs. His possession was not inconsistent with his relation to the plaintiffs, and there was no actual ouster or exclusive possession for twenty years: *Gilchrist v. Middleton*, 107 N. C. 681. Treating him either as a trustee or a tenant in common, the statute would not be put in operation until a demand and refusal, and there was none on the part of the plaintiffs or their ancestor: *Wright v. Cain*, 93 N. C. 296; *Davis v. Cotten*, 2 Jones Eq. 430; *Huntly v. Huntly*, 8 Ired. Eq. 250; *Bruner v. Treadgill*, 88 N. C. 361.

5. Under the view which we have taken, the presence of the administrator of F. H. Maxwell was not necessary to the determination of the issues submitted to the jury. If, however, his presence is deemed essential to a proper adjustment of the equities arising upon the accounting, he should, upon the motion of either the plaintiffs or defendant, be made a party: Code. sec. 189. So far as we are able to see, there appears to be no error in the directions given to the referee; but the defendant is not precluded from renewing his exceptions to these upon the coming in of the report.

Upon a consideration of all of the exceptions presented by the defendant, we are of the opinion that there is no error.

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**LIMITATIONS OF ACTIONS — CO-TENANT.** — The statute of limitations does not run in favor of a tenant in common against his co-tenant, until the former has done something to make his possession of the common estate adverse: *Greenhill v. Biggs*, 85 Ky. 155; 7 Am. St. Rep. 579, and note.

**LIMITATIONS OF ACTIONS — TRUSTS.** — As to the application of the statute of limitations to express trusts, see note to *Landis v. Saxton*, 24 Am. St. Rep. 406, 407; note to *Bell v. Hudson*, 2 Am. St. Rep. 799-801. The rights of a cestui que trust under an express trust cannot be barred by the statute of limitations so long as the trust exists: *Pratt v. Thornton*, 28 Me. 355; 48 Am. Dec. 492; *Lexington etc. Ins. Co. v. Page*, 17 B. Mon. 412; 66 Am. Dec. 165, and note; *Smith v. Glover*, 44 Minn. 260; *Roach v. Caraffa*, 85 Cal. 436.

**TRUSTS — TRUSTEE'S POWER TO SELL.** — A trustee is presumed to hold property for administration, and not for sale: *Marbury v. Ehlen*, 72 Md. 206; 20 Am. St. Rep. 467. Trustees have no power of sale over trust property unless it is given them expressly or by implication: Note to *Rankin v. Rankin*, 67 Am. Dec. 209. A trustee's power with respect to trust property is limited by the instrument creating the trust, and he must be governed strictly by its provisions: *Atkinson v. Beckett*, 34 W. Va. 584.

PIONEER MANUFACTURING COMPANY v. PHOENIX  
ASSURANCE COMPANY.

[110 NORTH CAROLINA, 175.]

**INSURANCE — WHEN SEVERABLE.** — When a policy of insurance classifies and specifies numerous items of property and the sums of money for which they are severally insured, the contract is not single, and the insured may sue and recover for loss or damage to any of the several items, although he alleges a total loss of the property insured.

**INSURANCE — RECOVERY UNDER SEVERABLE CONTRACT — ARBITRATION.** — Where a severable policy of insurance upon distinct items of property provides that all differences as to loss or damage shall be submitted to arbitration, and the insured sues to recover for a total loss, he may file an abandonment as to so much of the cause of action as is embraced in a demand that certain differences be submitted to arbitration, and recover for the remainder of the loss.

**INSURANCE — PLEADING — WAIVER.** — When the insured relies upon a waiver of material conditions in the policy of insurance, he must plead it; but if on the trial it becomes necessary for him to show a waiver of some immaterial condition in the policy, he may prove it without having pleaded it, or he may amend his pleadings so as to admit the necessary proof.

**ACTION** to recover on a policy of insurance covering a hard-wood factory, together with its fixtures and material on hand. The policy classified and specified the numerous items of property covered by it, and stated the sum of money for which each of them was severally insured. The remaining facts are stated in the opinion. Judgment for plaintiff, and defendant appealed.

*R. H. Battle and S. F. Mordecai*, for the plaintiff.

*J. W. Hinsdale*, for the defendant.

**MERRIMON, C. J.** The court properly declined to submit to the jury the issues of fact proposed by the defendant in respect to "the engine, two boilers, with inspirator and connections." These things had been eliminated from the complaint before the trial began, for reasons that will presently be stated. They were not in question, and hence all such issues were immaterial. Indeed, it would have been improper to submit them, because they would have tended, more or less, to mislead and confuse the jury as to the inquiries they were charged to make.

The plaintiff alleged in its complaint the total loss by fire of the property insured by the policy sued upon, except an engine and two boilers, which were greatly damaged. Before the trial began the court allowed the plaintiff to enter on the



record that it abandoned so much of its claim and demand as had reference to and embraced "the engine, two boilers, inspirator, and connections." The defendant, insisting that the cause of action was single, and not divisible, excepted. This exception is not tenable. The policy of insurance sued upon embodies a single contract of insurance, but it does not insure the several articles and kinds of property specified and classified in it as constituting a single item and subject of insurance. It plainly, and of purpose, classifies and specifies numerous items of property and the sum of money for which they are severally insured, the purpose being to make order, convenience, and in part, at least, to enable the insured on the one hand to sue for and recover damage as to any of the several items, and on the other hand to the end the insurer may the more readily protect himself by showing that certain items were not destroyed, or were not wholly so, or were not injured at all. Although the plaintiff alleged a total loss of the property, if on the trial he could not prove such loss, he might prove a partial loss, that certain items specified were wholly lost, that others were injured and rendered valueless or partially so, and the defendant might show as a matter of defense that certain items or pieces of property were not destroyed, or only slightly damaged. The nature and terms of the contract of insurance in this case, and the purpose of the action, contemplate and intend that the plaintiff may recover, and the defendant may make defense, as just indicated. The formal entry of abandonment of claim as to the particular things mentioned was really not necessary, but it did no harm or prejudice to the defendant; indeed, it served the good purpose of putting controversy as to them out of the case; and thus out of the case, all issues as to them and all evidence bearing upon and in respect to them were unnecessary, irrelevant, and improper. The plaintiff formally ceased to claim damages under the contract on account of them.

The policy of insurance, among other things, provides that "if at any time differences shall arise as to the amount of loss or damage, or as to any question, matter, or thing arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense to each of the parties, to two competent and impartial persons," etc. Differences arose as to the extent of loss and damage as to "the engine and two boilers, with the inspirator and connections," and the defendant demanded in writing that these dif-

ferences be submitted as above provided. The plaintiff declined to so submit the same. Afterwards, in this action, it was decided that the plaintiff could not maintain its action until such submission had been made: See *Pioneer Mfg. Co. v. Phoenix Assurance Co.*, 106 N. C. 28. The defendant insists that although the plaintiff abandons its claim as to the things last mentioned, it cannot maintain this action, because it so refused to submit the difference mentioned. But the policy does not so provide, nor, as we have seen, is there anything in the nature and purpose of the contract embodied in it that prevents the plaintiff from maintaining his action as to so much of the cause of action alleged as is not embraced by the defendant's demand that certain specified differences be submitted to arbitration. This action was not founded solely upon the latter account, — its compass and purpose extended to all damages sustained by the plaintiff on account of all loss insured against by the policy. If the plaintiff could not for any cause recover as to loss sustained on a particular account, he might, nevertheless, recover as far as the merits of the case in his favor would allow. The failure to maintain the action successfully as to damages sustained on a single account, among many, did not necessarily put an end to it. It continued for all proper purposes. Nor did this court decide otherwise when this case was before it by a former appeal. For the present purpose it decided no more than that the action could not be maintained as to so much of the cause of action as was embraced by the defendant's demand that certain differences be submitted to arbitration. We cannot conceive of any just or even plausible reason why, as to a second cause of action, or other separate item of damage sustained, the action might not be made available. Indeed, it ought to be continued until it completes its purpose as nearly as practicable. We are not called upon to decide whether the plaintiff could in any case maintain a second action upon the same policy as to items of loss not embraced by this action, but embraced by the policy.

The defendant alleged in its answer that the plaintiff had failed upon demand to furnish it "with plans and specifications of the building destroyed," and "with plans and specifications of the one-story frame, tin-roof, main factory building, with shed and engine-room"; and that it also failed to furnish "the duly verified certificate of some reliable and responsible builder as to the actual cash value of the building

insured immediately before the fire." The plaintiff on the trial produced evidence tending to prove that it had furnished proof of its loss as required by the policy, except in the respects above mentioned, and it also offered evidence tending to prove that it had furnished specifications of the buildings mentioned as far as it could by reasonable diligence do. It further produced evidence to prove that the defendant had waived the demands above mentioned. The court admitted evidence tending to prove such waiver, and submitted pertinent issues to the jury in that respect. The defendant objected to this evidence and the submission of such issues, because there was no allegation of such or any waiver in the complaint, and further upon the ground that there was, as it insisted, no evidence of a waiver. Where a party relies upon a waiver of something required to be done incident to a cause of action, particularly in respects material and important, he should allege the same in proper connection in the pleadings, and it would be safer and better to do so in all cases. But where on the trial in the action he fails to prove sufficiently his compliance with some requirement that does not affect the real and substantial merits of the matter in controversy, there is no sufficient reason why he may not at once suggest and prove the waiver if he can, and thus help out his defective proofs. If the party offering such proof had been negligent, the court might decline to admit the same, and if the opposing party should be surprised, it might in a proper case allow a mistrial on just terms as to costs. The court might also allow appropriate amendments of the pleadings. Such practice can do no harm, and in many cases it might promote the ends of justice. It is quite in harmony with the liberal spirit of the Code of Civil Procedure, made manifest in many of its provisions. In such case it is not necessary that a pertinent issue be submitted to the jury, but the court may do so in its discretion, with a view to convenience and the more distinctive and intelligent ascertainment of the fact, unless where in possible cases a party might suffer prejudice from it.

The defendant's counsel insisted earnestly on the argument that there was no evidence on the trial of such waiver suggested by the plaintiff. We have carefully examined the evidence sent to this court, and are clearly of opinion there was such evidence, as well as evidence to the contrary. The jury acting upon the whole, rendered their verdict upon the material issues favorable to the plaintiff.

The defendant propounded to the plaintiff, as it might do under a provision of the policy, certain questions, which it failed to answer. It is insisted that such failure is fatal to the plaintiff's recovery. This contention is unfounded. The evidence and information intended to be elicited by these questions were not pertinent or material on the trial. They related to the "engine and two boilers, including inspirator and connections." As we have seen, these things were eliminated from the action, and all inquiry concerning them was immaterial and irrelevant.

There are numerous exceptions, several of which were properly abandoned on the argument. The others are disposed of by what we have said, except such as are unimportant and plainly without merit.

Affirmed.

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**INSURANCE CONTRACT, DIVISIBILITY OF.** — Upon the question of the entirety or divisibility of contracts of insurance covering different kinds of property, each separately valued, where the premium is paid in gross, there seems to be a variance of authorities: *McQueeny v. Phenix Ins. Co.*, 52 Ark. 257; 20 Am. St. Rep. 179; *Loomis v. Rockford Ins. Co.*, 77 Wis. 87; 20 Am. St. Rep. 96; *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; 29 Am. Rep. 184; *Havens v. Home Ins. Co.*, 111 Ind. 90; 60 Am. Rep. 689; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172; 18 Am. St. Rep. 324; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393, in all of which cases the authorities, both pro and con, are collected and commented upon. In *Pratt v. Dwelling-house etc. Ins. Co.*, 130 N. Y. 206, a contract of insurance upon different kinds of property, each separately valued, was considered as severable, notwithstanding the fact that only one premium was paid, and the amount insured constituted the sum total of the valuations.

**INSURANCE — WAIVER — PLEADING.** — Where an assured relies upon a waiver of compliance with conditions contained in his policy, he must plead the waiver: *East Texas Ins. Co. v. Brown*, 82 Tex. 631; *Eiseman v. Hawkeye Ins. Co.*, 74 Iowa, 11; and such a waiver may be set up by way of a replication: *Brown v. Commercial Fire Ins. Co.*, 86 Ala. 189.

**DIBBRELL v. GEORGIA HOME INSURANCE CO.**

[110 NORTH CAROLINA, 192.]

**INSURANCE — TIME TO SUE — WAIVER BY AGENT.** — When an insurance adjuster has a right under the policy sued on to insist upon the production of further proofs of loss in addition to those furnished, such power necessarily involves authority to waive a requirement of the policy that action must be brought within a certain time after loss, if the additional proofs required cannot be obtained within that time.

**INSURANCE — TIME TO SUE — WAIVER BY AGENT.** — When an adjuster for an insurance company persistently demands further proofs of loss in addition to those already furnished, with full notice that they cannot be obtained until long after the time within which suit is required to be brought under a condition in the policy, such condition will be deemed to have been waived by the insurer, and he will be estopped from insisting on its enforcement.

**INSURANCE — CONDITION AS CONTRACT — WAIVER — ESTOPPEL.** — A condition in an insurance policy that a failure to bring suit within a certain time after loss shall constitute a forfeiture is a contract, and not a statute of limitations, and may be waived by the insurer, or he may be estopped by his acts from insisting upon its enforcement.

**INSURANCE — CONDITIONS — WAIVER.** — A stipulation in a policy of insurance that no agent of the company is authorized to change its terms and conditions, and that they shall not be waived except in writing indorsed on the policy, does not apply to conditions to be performed after the loss is incurred, nor invariably to the warranties of the contract if any fraud be practiced.

**INSURANCE — CONDITIONS — WAIVER BY AGENT.** — When the insured is led by the conduct of an agent of the insurer, acting within the scope of his authority, to believe that one stipulation in the policy will not be insisted on, or such agent insists upon the performance of another stipulation inconsistent with the enforcement of the first, the latter is deemed to be waived without indorsement on the policy.

**ACTION** to recover on a policy of fire insurance. Judgment for plaintiffs, and defendant appealed.

*A. O. Zollicoffer*, for the plaintiffs.

*J. W. Hinsdale*, for the defendant.

**AVERY, J.** (after stating the case). In his first interview with the plaintiffs, soon after the fire, which occurred July 31, 1888, the adjuster of the defendant told them that their "books were not straight, but he would give them time to straighten them, and would (then) adjust the loss." Inside of the sixty days' limit fixed in the policy, the plaintiffs forwarded proofs of loss, which seem now to have been sufficient, as no further objection is urged to them. After waiting for an acknowledgment of the receipt of proof of loss, or for some further statement of the objection to their books, until May, 1889, the

plaintiffs seem to have determined upon aggressive action for the recovery of their demand against defendant. Meantime, Spencer, the adjuster, says that he made no objection to the proof of loss, because it was not incumbent on him to do so.

So soon as the plaintiffs began to move, first, by insisting upon knowing the adjuster's objection to a settlement, and then, on May 10, 1889, by demanding, through their attorneys, of the president of the company, the immediate payment of one thousand dollars, with interest from October 1, 1888, the adjuster seemed to feel it incumbent on him to meet them with counter-demands for duplicate bills of all of the tobacco received at the warehouse in January, 1887. When the plaintiffs had sent for these bills and met Spencer again, they were informed that he insisted, according to the stipulations in the policy, that he should have for examination duplicate bills of all tobacco received at the warehouse from January 1, 1887, till July 31, 1888. As the policy covered tobacco in the warehouse that was owned absolutely by plaintiffs, as well as that consigned to them to sell on commission, he contended that he had the right to compare the books and the duplicate bills. When told by the plaintiffs, on June 1, 1889 (eleven months after the loss was sustained), that it would then take them six months to comply with his new demand for duplicate bills for eighteen months instead of for the month of January, 1887, only, Spencer replied that plaintiffs must do the best they could, and inform him when they should get the bills, and he would adjust the loss. The plaintiffs, taking him at his word, began to get up duplicate bills; but, according to the uncontradicted testimony of R. L. Dibbrell, found it impossible to finish the work before January 1, 1890. When they did inform the adjuster of their readiness to comply with his demand, they could not induce him to answer even a registered letter communicating the fact. He then claimed that while the plaintiffs were engaged in the vain effort to comply with a demand performed in accordance with one stipulation of the policy, they had forfeited their right of action under another stipulation, which restricted them in its exercise to twelve calendar months after the loss occurred. The adjuster had felt it incumbent on himself to warn them of the Scylla of defective proofs, but had carefully refrained from suggesting that, in avoiding that, they would be stranded on the Charybdis of delay in initiating suit. If they had brought their action when their counsel proposed to issue summons, on the 12th of

May, 1889, the defendant would have resisted their recovery, upon the ground that they had failed when "required" to "furnish original or properly certified invoices of all property insured." The original bills of tobacco bought by them or sent by customers for sale were destroyed, and duplicates could not be gotten in less than six months.

The enforcement of both conditions of the policy at the same time was not possible, and the question, therefore, naturally arises, whether, by demanding compliance with the one stipulation, the agent of the company did not waive the right to insist upon the performance of any other, the enforcement of which was inconsistent with his own demand. It seems to us that if the adjuster had a right to insist upon the production of the vouchers, or to waive such proof as he deemed best for the company, such power necessarily involved the authority also to waive the requirement that the action should be brought before such papers could be obtained. Wherever a company empowers an agent specially to do, or the scope of his agency permits him to do, any act inconsistent with the idea that the company will insist upon a forfeiture under a given condition in the policy, then such act when done by him must be construed as a waiver of the right to demand its enforcement: 2 May on Insurance, secs. 497, 505. This principle has been distinctly recognized by this and other courts of the country so often that it ought not to be deemed necessary to cite authority in support of it. In the case of *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 477, 23 Am. St. Rep. 62, this court held that where an adjuster required the insured to furnish invoices of goods destroyed, proofs of loss, or plans and specifications of buildings burned, or to appear for examination, such act amounted to a waiver of the right to insist upon a forfeiture for failure to comply with a condition of the policy relieving the company from the contract, in case of subsequent insurance of the same property without the written consent of the company indorsed on the policy. This view is sustained by the decisions of other courts, some of which have emanated from the most eminent jurists of the country: *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Webster v. Phoenix Ins. Co.*, 26 Wis. 67; 17 Am. Rep. 479. In Grubbs's case the adjuster made the demand, as in this case, for duplicate invoices in place of those destroyed by the fire, and the ruling of the court rested on the

very substantial reason that if the adjuster, acting in the scope of his authority, insisted that the insured should incur the expense of collecting these invoices, such a demand was inconsistent with the idea that the policy was forfeited. A persistent demand for proofs, with full notice that they could not be gotten till six months after the expiration of the limit of twelve calendar months (and then by incurring expense and performing much labor), was an act in the scope of the adjuster's authority, but utterly inconsistent with the present contention of the company that the right of action was forfeited by failure to issue a summons before July 31, 1889. Speaking through its adjuster, the corporation said, in effect, at the end of eleven months after the fire: If you sue now, the company will resist recovery on the ground that you have failed to furnish duplicate invoices on the demand of its authorized agent, in accordance with the conditions of the policy: *Indiana Ins. Co. v. Capehart*, 108 Ind. 270. When, by this shrewd device, the insured, who has paid the premiums and complied with his contract, is induced to engage in the laborious and expensive work of collecting duplicate invoices of tobacco received for eighteen months before the fire, and to allow twelve calendar months to elapse, while so occupied, without instituting suit, the adjuster, having played his part, is relegated to the background, and the company, by its counsel, comes into court and says: "It is true, the adjuster had the right to insist upon further proofs of loss under the condition of the policy, but in fact, sufficient proof had already been furnished him by the insured, though it was not incumbent on him to admit it, and he had a right to insist, as he did, upon the insufficiency of the proof sent on September 25, 1888; but the adjuster was only a special agent as to the stipulation limiting the time bringing the action." By the terms of the policy the insured was bound to furnish proofs of loss within sixty days after the fire occurred, and it was not on argument, and we suppose will not now be denied, that the adjuster, or other agent of a company intrusted with the duty of receiving and passing upon the statement of the loss, has, by implication arising out of the authority given him, the power to extend the time for furnishing the proofs: *Lycoming Co. Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

So it is well settled, that if, instead of extending the time for filing proofs of loss, the adjuster, who is charged with the duty of examining them, informs the assured before the ex-



piration of the sixty days that he denies the justice of his claim and will not pay it, such conduct, by implication, renders it unnecessary to make out a statement of loss, and is held to be a waiver of the requirement to furnish it, as well as of the condition that suit shall not be brought within that time: *Georgia Home Ins. Co. v. Jacobs*, 58 Tex. 366; 2 May on Insurance, sec. 504. As a general rule, if the insurer, through the conduct of any agent acting within the scope of his authority, lead the insured into an infraction of one of the conditions of a policy by insisting upon the performance of a duty enjoined by another clause of the policy, and inconsistent with the observance of such condition, the insurer will be estopped from insisting upon a forfeiture: 2 May on Insurance, p. 1144, and notes 2, 3, secs. 497, 499. And it has been expressly held, that "statements by a local insurance agent that the plaintiff's loss was all right," and that the company would pay the amount, constitutes a waiver by the company of the clause in the policy requiring formal proof of loss, and also "the one barring suits not brought within one year": *Idle v. Insurance Co.*, 2 Burr. 235; 2 May on Insurance, sec. 504. The authorities cited, and many others, recognize the power of even a local agent, while acting within the scope of his authority, to waive the forfeiture prescribed for the infraction of a given condition in a policy by leading him into the reasonable belief that it will not be insisted on, and they also lay down the principle that the company is estopped in such cases from taking advantage of the breach of the condition, because it would be fraudulent to do so. In *Moss v. London Assurance Co.*, 108 N. C. 242, it is declared that such stipulations, operating as forfeitures, are construed strictly, and comparatively slight evidences of waiver have been held sufficient to prevent their enforcement: *Ripey v. Aetna Ins. Co.*, 29 Barb. 552; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253.

Counsel for defendant seem to have overlooked the fact that the plaintiffs are not insisting that the defendant company, by the conduct or the words not reduced to writing of its authorized agents, could extend the operation of a statute of limitations, but that it could, by language uttered and acts done by such agents while in the line of duty, waive the exaction of a forfeiture, which is not favored by the court. Says Judge Christiancy, in *Peoria etc. Ins. Co. v. Hall*, 12 Mich. 211, in referring to a stipulation similar to that under consideration: "If valid at all, it was valid as a contract, not as a

statute. A limitation fixed by statute is arbitrary and peremptory, admitting of no excuse for delay beyond the period fixed, unless such excuse be recognized by the statute itself. But a limitation by contract (if valid) must, upon the principle governing contracts, be more flexible in its nature, and liable to be defeated or extended by any act of the defendant which has prevented the plaintiff from bringing his action within the prescribed period." In that case it was held that the condition was waived by furnishing no opportunity to plaintiff to serve process just before the expiration of the twelve months. A case directly in point is *Ames v. New York Union Ins. Co.*, 14 N.Y. 253, wherein, discussing the waiver of a similar condition that suit must be brought within six months, the court said: "The defendants had it in their power, by objecting to the proofs of loss and neglecting or refusing to file them, to extend the time in which they were required to pay beyond the period of six months after the occurrence of the loss, and in such case clearly it could not be pretended that the insured had stipulated away his right of action, but the defendants would be deemed to have waived the twelfth condition. In this case the proofs of loss were delivered to the defendant some nine days after the fire. They were retained without objection eighty-five days, or within five days of the time when the loss was due and payable by the ninth condition. It was then first suggested by the secretary that the proofs were incomplete in not setting forth, as required, whether or not the insured property was encumbered. Seven days thereafter, and on the 14th of October, the plaintiff transmitted an affidavit to the company supplying the alleged defect. No further objection was heard from the defendants, but they had secured all that was probably desired, — an extension of time for ninety days from the 14th of October, and put it out of the power of the plaintiff to successfully maintain an action commenced within six months after the loss occurred. He was told, in effect, that the defendants would insist on the terms of the ninth condition (which provided that suit could not be brought for ninety days after filing proof of loss), as to the time when the loss was due and payable, and that if he commenced an action to avoid the bar prescribed by the twelfth condition, they should interpose the defense that by the contract the insurance money was not yet due and payable. It cannot be doubted that the defendants intended to and did waive the limitation stipulated by the twelfth con-

dition." This opinion is cited with approval by leading text-writers and many of the courts. Says 2 May on Insurance, sec. 505: "Thus the insured is estopped to object to a failure to bring suit within the time limited by an offer to pay the loss afterwards or when such failure is induced by the conduct of the insurer"; citing Ames's case to sustain the position.

In *Muse v. London Assurance Co.*, 108 N. C. 242, this court, following the current of authority, held that the stipulation that there should be a forfeiture unless suit should be brought within twelve months after the loss operated as a contract which might be waived, and not as a statute of limitation. Indeed, in that case it was declared that plaintiff might have submitted to judgment of nonsuit, and brought a new action within a year after such judgment, though after the expiration of twelve months from the fire, if the limit had been imposed by a statute instead of by contract. When the rights of *Muse* were declared lost, because the principles applicable to the statute of limitations did not apply to a contract, we are at a loss to understand how counsel can contend that in the case under consideration the plaintiffs have lost their right of action because the bar of the statute of limitations cannot be extended except by an agreement in writing and upon consideration, or at any rate a direct promise not to plead it. Neither *Joyner v. Massey*, 97 N. C. 148, nor any of the class of cases to which it belongs, applies to that at bar. We might concede the law in its application to statutes of limitation to be just what counsel insisted that it was, and still the plaintiffs would be protected by the well-established principle that contracts providing for forfeitures are more "flexible" than statutes of limitation, and may be waived by very slight circumstances: *Muse v. London Assurance Co.*, 108 N. C. 242; *Peoria etc. Ins. Co. v. Hall*, 12 Mich. 211; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253; 2 May on Insurance, sec. 505. The usual stipulation in a policy that no agent of the company is authorized to change its terms or conditions, and that they shall not be waived except in writing indorsed on the policy, does not apply to conditions to be performed after the loss is incurred, nor invariably even to the warranties of the contract, if any fraud be practiced: *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 800; 39 Am. Rep. 584; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 421; 32 Am. Rep. 330; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270; *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Day v. Dwelling House Ins. Co.*, 81 Me. 244; *Universal Mut. F. Ins. Co. v. Weiss*, 106 Pa. St. 20; *Horn-*

*thal v. Western Ins. Co.*, 88 N. C. 71; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 422; 93 N. C. 240; *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C. 477; 23 Am. St. Rep. 62; *Follette v. United States Mut. Acc. Ass'n*, 107 N. C. 240; 22 Am. St. Rep. 878; *Lamberton v. Connecticut Fire Ins. Co.*, 39 Minn. 129. Where, as in our case, the insured is led by the conduct of an agent of the company, acting within the scope of his authority, to believe that the stipulation will not be insisted on, or such agent insists upon another stipulation inconsistent with its enforcement, the condition is deemed waived without the indorsement on the policy.

The plaintiffs' counsel, on May 10, 1889, demanded a settlement of the president, and the secretary replied referring them to the adjuster, who had "the matter in hand" and would treat with them, thus waiving directly their right to arrange the matters in controversy, if such authority would otherwise have been exclusively in them, and holding the adjuster out to the plaintiffs as armed with full power to represent the company and treat with the plaintiffs, or their attorneys in their stead, as fully as they or either of them could do. The facts in our case, therefore, present a peculiar aspect, in that the adjuster is expressly clothed with plenary power in the conduct of the settlement, as far as the president and the secretary of the company could confer such authority. Considering Spencer, then, as the representative of the president, and so held out by his letter, he had authority, either directly or by implication, as a general agent of the company, in the language of Chief Justice Smith in *Hornthal v. Western Ins. Co.*, 88 N. C. 71, "to waive a forfeiture, and dispense with what would otherwise cause it."

We are aware that it is possible to find authority in support of a different view of this case from that taken by us, but we prefer, as between conflicting opinions, to follow that line of authorities that does not leave an ignorant individual who has made an honest effort to perform his contract at the mercy of shrewd agents of corporations because of stipulations with which he has been bound hand and foot. We have no sympathy with any construction of contracts which would leave the courts powerless in the presence of an acknowledged fraud, though it be perpetrated by hedging one about with restrictive conditions and forfeitures, so that, pursue what course he will, he runs counter to a stipulation which, if strictly enforced, is fatal to his recovery of the money justly due to him in consid-

eration of the fact that he has paid his premiums and comes before the court with clean hands. Under such circumstances technical defenses should be disregarded upon slight evidence of a waiver of rights under them, in order to do substantial justice.

We think, for the reasons given, that there was no error in the charge of the court below of which the defendant had just cause of complaint. His honor put upon the plaintiffs the burden of showing that the adjuster made the promise to pay for the purpose of inducing delay, and then taking advantage of it under the limitation stipulation, though we consider the demand of the adjuster for the performance of any condition that he had a right to insist on, and which was inconsistent with the bringing of the action within the limited time a waiver of that stipulation: *Ames v. New York Union Insurance Co.*, 14 N. Y. 253. It seems to us, also, that the judge might have told the jury that if the stipulation was waived by the conduct and language of the adjuster, then the plaintiffs were left free from any restriction as to the time of bringing suit, except such as was imposed by the statute of limitations. The waiver, which jury the found was made by the adjuster, grew out of his insisting upon proofs which it required an indefinite time to procure and furnish, and it must be construed to have been absolute and unconditional, not an extension of its operation while the proofs were being produced. If the right to demand the forfeiture was waived at all, it was by such conduct on the part of the adjuster as made it inequitable for the company to insist upon the stipulation, or in other words, it was because the defendant was estopped by its conduct from enforcing that clause of the contract then or afterwards: 2 May on Insurance, sec. 505, and other authorities cited *supra*. If the defendant was estopped from enforcing the forfeiture by matter *in pais*, such as the conduct of its agent, inconsistent with the right to demand a compliance with it, it is difficult to understand how the estoppel could operate to defer the enforcement instead of destroying the right to insist upon it entirely.

Affirmed.

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MERRIMON, C. J., dissented, and expressed the opinion that in view of the facts in the case and the express stipulations in the policy, no waiver or estoppel was raised against the insurer, while the insured by his laches had lost all right to maintain any action on the policy. After quoting the stipulations contained in the policy, to the effect that no action should be sustained thereon unless commenced within twelve months next after the loss,

and that no agent or representative of the insurer should be held to have waived any of the terms or conditions of the policy, unless such waiver was indorsed thereon in writing, Judge Merrimon said: "It is not pretended that the defendant or its agent waived the agreement that the plaintiff in case of loss should bring his action within twelve months next after it accrued by writing or indorsement on the policy, or in writing at all. The plaintiffs knew of this agreement; it is presumed, and must be taken, that they had knowledge of it; it is not contended that they did not. It was, therefore, their laches if they allowed more than twelve months to elapse after their loss before they brought their action without having a waiver as to the lapse of time indorsed on the policy. In the face of the express stipulation above recited, and the absence of an indorsement of such waiver on the policy, and in the absence of all agreement of such waiver, I cannot see any just or valid reason, legal or other, why the agreement of the parties shall not be enforced according to its plain terms and purpose. It is not alleged that the defendant or its agent fraudulently induced the plaintiffs to delay the bringing of their action, but simply that they were induced to do so by the defendant's "actions and promises." It appears that the plaintiffs furnished their proof of loss. The defendant's agent (the adjuster) insisted that they should furnish certain other evidence of the extent of their loss. But the plaintiffs did not ask the agent of the defendant to waive the lapse of time in writing on the policy or otherwise, as they might have done; they said nothing on that subject, nor did the defendant or its agent intimate that he had any authority to do so, nor did he promise to do so. There was no evidence sufficient to go to the jury to prove such a waiver by act or promise in writing or otherwise. The evidence relied upon, fairly interpreted, gives rise to no more than conjecture or the merest inference, that ought not to be allowed to prevail to destroy a plain and express stipulation. If evidence of the waiver, other than a waiver in writing indorsed on the policy, could be competent at all, it should have been clear and distinct, not such as gave rise to mere inference or possible implication. Moreover, it was in evidence, without contradiction, that the adjuster had no authority to waive any stipulation of the policy. In my judgment there is error, and there ought to be a new trial."

**FIRE INSURANCE—TIME TO SUE—WAIVER BY AGENT.**—A condition in a policy requiring suit to be brought within a certain time may be waived by such conduct on the part of the company's general agent as encourages and authorizes the insured to believe that his claim will be adjusted and paid, until after the limited time has elapsed: *Little v. Phoenix Ins. Co.*, 123 Mass. 380; 25 Am. Rep. 96.

**FIRE INSURANCE—TIME TO SUE—WAIVER.**—Upon the question of a waiver of a condition in a policy requiring suit to be brought for the loss within a certain time, generally, consult *State Ins. Co. v. Meesman*, 2 Wash. 459; 26 Am. St. Rep. 870, and note 875-877; *Matt v. Iowa Mut. Aid Ass'n*, 81 Iowa, 135; 25 Am. St. Rep. 433, and note; *Allemania F. Ins. Co. v. Peck*, 133 Ill. 220; 23 Am. St. Rep. 610, and note.

**INSURANCE—WAIVER OF FORFEITURE** by requiring further proofs of loss: See note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 236, 237.

**FIRE INSURANCE—CONDITIONS**, to the effect that no agent can waive any of the conditions of a policy unless such waiver is specially authorized in writing over the signature of the president, etc., do not apply to conditions to be performed after a loss occurs: *Travelers Ins. Co. v. Harvey*, 82 Va. 949; *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 19 Am. St. Rep. 326; nor to condi-

tions to be entered into and performed prior to the issuance of the policy: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.

**FIRE INSURANCE — WAIVERS BY AGENTS.** — Concerning provisions in policies limiting the power of agents to waive forfeitures or conditions except in writing, see note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 234-236. See also note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 248. An insurance agent may waive forfeiture where a claim for loss has been placed in his hands for adjustment; for he will be presumed to be authorized to do whatever may be required to be done in adjusting the loss: *Brown v. State Ins. Co.*, 74 Iowa, 428; 7 Am. St. Rep. 495. An agent with authority to receive applications for insurance has no apparent authority to waive forfeitures for reinsurance: *American Ins. Co. v. Hampton*, 54 Ark. 75.

## SCOTT v. FISHER.

[110 NORTH CAROLINA, 311.]

**SURETYSHIP — SURETY WHEN DISCHARGED.** — When a creditor enters into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety.

**SURETYSHIP — CONTRACT DISCHARGING SURETY.** — An agreement entered into between the payee and the principal debtor in a note, without the consent of the surety, by which the time for its payment is extended upon the payment of interest thereon semi-annually, instead of annually as stipulated for in the note, is based upon a sufficient consideration, and so changes the contract of suretyship as to discharge the surety.

**INTEREST — CONTRACT FOR — COMPUTATION.** — When a note contains an agreement, made either before or after maturity thereof, for the payment of interest annually or semi-annually, the maker is chargeable with interest at a like rate upon each deferred payment of interest; and an independent action may be maintained for its recovery, in like manner as if the maker had given his note for the same amount.

**ACTION** against a surety to recover the amount of a note executed by J. S. Fisher as maker, E. L. Fisher as surety, and A. C. Scott as payee, due one day after date, with interest at eight per cent per annum. The defense relied upon by the surety was, that the payee, without his consent, had entered into a valid agreement with the maker to forebear and extend the collection of the note. It appeared that some time after the execution of the note, the maker met the payee and offered to pay the note, when the payee remarked that he did not need the money, and that if the maker would pay him the interest semi-annually, he might keep the money, to which the latter replied "All right," and kept the money; and that this agreement was entered into by the maker and payee of the note

without the knowledge or consent of the surety thereon. The court below instructed the jury that such an agreement was not such a contract to forbear to collect the note as would discharge the surety. Judgment for plaintiff, and defendant appealed.

*H. S. Puryear*, for the plaintiff.

*W. J. Montgomery*, for the defendant.

SHEPHERD, J. "It is well settled that if a creditor enter into any valid contract with the principal debtor without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety. A familiar instance of this is where a creditor binds himself not to sue or collect the debt for a given time, and thereby puts it out of the power of the surety to pay the debt and sue the principal debtor": *Deal v. Cochran*, 66 N. C. 269; *Forbes v. Sheppard*, 98 N. C. 111; *Hollingsworth v. Tomlinson*, 108 N. C. 245.

His honor held that there was no valid contract of forbearance so as to bring the present case within the principles above stated, and the ruling is based upon the idea that the promise on the part of the principal debtor to pay the interest semi-annually did not amount to a sufficient consideration to support the agreement. A valuable consideration is "any benefit to the person making the promise, or any loss, trouble, or any inconvenience to or charge upon the person to whom it is made; . . . and provided there be some benefit, etc., . . . the courts are not willing (in the absence of fraud) to enter into the question whether the consideration be adequate in value to the thing which is promised in exchange for it": *Smith on Contracts*, 166, 168.

Tested by this rule, we are of the opinion that the alleged promise conferred a benefit upon the plaintiff, in that it worked a material change in the contract in respect to the payment of interest. The note stipulates for the payment of interest at the rate of eight per cent per annum, and although it may not be paid until several years after it falls due, the payee is not entitled to interest upon the interest which has accrued at the date of maturity. The reason is, that the parties having, by acquiescence, extended the credit, the interest, which is an incident of the debt, goes with it and is not due at the maturity of the debt, so that an independent action for its recovery can be maintained. It is otherwise when the note contains an



express promise to pay interest at specified times. At each time there is a certain sum of money due, for which an action lies. "When there is an agreement set out in the note for the payment of interest annually or semi-annually, the maker is chargeable with interest at a like rate upon each deferred payment of interest, in like manner as if he had given a promissory note for the same amount. . . . By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest": *Bledsoe v. Nixon*, 69 N. C. 89; 12 Am. Rep. 642; *Knight v. Braswell*, 70 N. C. 709; *King v. Phillips*, 95 N. C. 245; 59 Am. Rep. 288; *Cox v. Brookshire*, 76 N. C. 314.

Such an agreement may be made either before or after the maturity of the debt, and when the principal debtor in this case agreed to pay the interest semi-annually, it so changed the original contract as to charge him with interest upon the interest accruing every six months thereafter, and this surely was such a benefit to the plaintiff, the payee, as would support his promise to forbear.

It is insisted in this court, though not distinctly passed upon below, that, granting the consideration to be sufficient, the contract is nevertheless void because of its indefiniteness. It is true, as argued by counsel, that there must be a definite time fixed for the extension of credit; that is to say, there must be a time fixed before which the creditor cannot proceed against the principal debtor, but we think this is fully complied with by the agreement to pay the interest semi-annually. However indefinite it may be after the first six months, it certainly amounts to an agreement to forbear for that period at least, and this is all that is necessary under our decisions to discharge the surety. In this we are sustained by the following authorities: "An agreement to extend the time for twenty or thirty days is definite as to twenty days, and therefore discharges a surety": 2 Daniel on Negotiable Instruments, sec. 1319. And so in *Pipkin v. Bond*, 5 Ired. Eq. 91, the surety was discharged, although the precise time fixed by the agreement could not be ascertained, the court remarking that "as men of common sense, with even a very slight acquaintance with the common course of dealing, we are obliged to perceive that the parties understood that no suit should, at all events, be brought before the next term of court."

In consideration of the foregoing reasons, we are of the opinion that the court erred in instructing the jury that the

testimony did not warrant an affirmative finding on the third issue.

As this disposes of the appeal, it is unnecessary to pass upon the question raised on the argument as to the effect of the alleged tender by the principal debtor. It is sufficient to say that the point is not raised, either by the answer or the issues.

#### Error.

**SURETYSHIP — WHAT WILL RELEASE OR DISCHARGE A SURETY.** — The obligation of a surety is not to be extended beyond the terms of his contract strictly interpreted: *First Nat. Bank v. Gerke*, 68 Md. 449; 6 Am. St. Rep. 453; *People v. Backus*, 117 N. Y. 196; *American Tel. Co. v. Lennig*, 139 Pa. St. 594; *Robinson v. Epping*, 24 Fla. 237; and any intentional material change in the terms of the contract by the original parties will discharge the surety: *Stevens v. Pendleton*, 83 Mich. 342; but the change in the terms of the original contract must be material: *Black v. De Camp*, 78 Iowa, 718. However, the rule may become inapplicable by reason of an apparent intention of the surety to come under a more enlarged obligation than a strict interpretation of the terms of his contract indicates: *McElroy v. Mumford*, 128 N. Y. 303. One who is not a surety at the time cannot claim a discharge on account of dealings between his principal and the creditor: *Dalton v. Rainey*, 75 Tex. 516. In *Schaeffer v. Bond*, 72 Md. 501, where a person entered into an agreement to restore property destroyed by fire in consideration of the insurance money being paid to him, the court held that his sureties were not released when, by reason of his failure to perform his contract in the agreed time, the application of the insurance money was made by the property owner to the restoration of the building.

So sureties of a contractor for the erection of a building are bound only in the manner and to the extent of their contract, and any changes made in the contract between the original parties either discharges them or affects their liability more or less: *Bennan v. Clark*, 29 Neb. 385; but such changes must be material, in some way infringing upon the rights of the sureties, as determined by the original contract: *Dorsey v. McGee*, 30 Neb. 657; *Steffes v. Lemke*, 40 Minn. 27.

Material alterations in an instrument after the signing thereof by a surety will operate to discharge him from any liability thereunder: *Wylie v. Hightower*, 74 Tex. 306; *Starr v. Blatner*, 76 Iowa, 356.

A creditor, by a valid and binding agreement, without the assent of the surety, giving an extension of time for payment to the principal, thereby discharges the surety: *Home Nat. Bank v. Waterman*, 134 Ill. 461; *Wylie v. Hightower*, 74 Tex. 307; *Price v. Dime Sav. Bank*, 124 Ill. 317; 7 Am. St. Rep. 367; note to *Okis v. Spencer*, 30 Am. Dec. 257, 258; but this is not true when the surety consents to the extension of time: *Sawyer v. Senn*, 27 S. C. 251; *Rockville Nat. Bank v. Holt*, 58 Conn. 526; 18 Am. St. Rep. 293, and note; or where the contract for extension of time is void for want of consideration or otherwise: *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565, and note; *Case v. O'Brien*, 66 Mich. 289; or where the surety is fully secured by property in his hands: *Home Nat. Bank v. Waterman*, 134 Ill. 461. In *Rochester Sav. Bank v. Chick*, 64 N. H. 410, a stipulation in a note that "all the signers agree to be holden should the time of payment be extended," was held not to bind a surety to an indefinite extension of the time of payment, nor to more than one extension. An extension of time for completing a

building does not affect the obligation of the contractor's sureties: *Steffes v. Lamb*, 40 Minn. 27. Mere indulgence to the principal by a creditor, there being no binding agreement for the extension of time, etc., will not release a surety: *Powers v. Silberstein*, 108 N. Y. 169; *Edwards v. Dargan*, 30 S. C. 177.

Where the creditor releases the principal, or surrenders to him securities taken from him for the debt, the surety is discharged, or at least released from liability to the extent of the securities surrendered: *Wilbur v. Williams*, 16 R. I. 242; *Bank of Monroes v. Gifford*, 79 Iowa, 300; unless the surety has knowledge of the facts, and assents: *Crim v. Fleming*, 123 Ind. 438; or is fully indemnified against loss by reason of having become a surety: *Jones v. Ward*, 71 Wis. 152. Transfers or disposals of collateral securities by a creditor do not release the debtor's sureties: *Wilbur v. Williams*, 16 R. I. 242; *Bryant v. Henderson*, 88 Tenn. 23. But in *New England etc. Ins. Co. v. Randall*, 42 La. Ann. 260, it was decided that where a creditor received property from a debtor for the payment of a debt for which security had been given, he had no right to dispose of it or to appropriate it without the surety's consent.

A surety is discharged when the means of protecting himself are fraudulently taken from him by the creditor: *Mathews v. Everett*, 84 Ga. 472; but fraud of the principal, without participation of the creditor, will not release a surety: *Bank v. Buchanan*, 87 Tenn. 32; 10 Am. St. Rep. 617.

For a discussion of the release of sureties by the creditor's acceptance of the non-negotiable note of the principal, see *Lindeman v. Rosenfield*, 67 Ind. 246; 33 Am. Rep. 79, and particularly note 85, 86. The acceptance of a new security which is void in discharge of a prior obligation will not release a surety on the original contract: *Godfrey v. Crisler*, 121 Ind. 203. In Indiana, under the acts of 1851, relating to official bonds, the acceptance by the county commissioners of a new bond of a county clerk, did not release the sureties on the original bond: *Sulliran v. State*, 121 Ind. 342.

For the release of sureties by a change in the duties or obligations of their principals, see note to *First Nat. Bank v. Gerke*, 6 Am. St. Rep. 458-460; also consult *American Tel. Co. v. Lennig*, 139 Pa. St. 594.

A surety will be discharged if a creditor fails to preserve unimpaired all his rights against the debtor: *New England etc. Ins. Co. v. Randall*, 42 La. Ann. 260; or does anything which is calculated to increase the surety's risk or expose him to greater liability: *Marchman v. Robertson*, 77 Ga. 40. But mere negligence or passive inactivity in calling the principal to account does not necessarily discharge a surety: *Mayor v. Stout*, 52 N. J. L. 35; *Smith v. Smithson*, 48 Ark. 261; *Harrison Machine Works v. Templeton*, 82 Tex. 443. A creditor does not lose his right to hold the surety by inaction or passiveness, until the surety has complied with the statutory provisions as to notifying the creditor to proceed against the principal: *Barnes v. Mowry*, 129 Ind. 568. In *Huddleston v. Francis*, 124 Ill. 195, it was decided that under the act of March 4, 1869, the failure of the payee of a joint note to present the same against the maker's estate within two years after the grant of letters of administration operated as a discharge of the sureties absolutely. In *Smith v. Smithson*, 48 Ark. 261, however, in an action against a surety on a deceased guardian's bond for a defalcation, the failure of the plaintiff to present his claim for allowance against the decedent's estate within two years after grant of letters of administration was held no defense for the surety.

The release of a levy of an execution upon a surety's property will not release his co-surety, for they are joint obligors with respect to each other and their principal: *Alexander v. Byrd*, 85 Va. 690.

## FOLLETTE v. MUTUAL ACCIDENT ASSOCIATION.

[110 NORTH CAROLINA, 377.]

**INSURANCE — KNOWLEDGE OF AGENT WHEN IMPUTED TO INSURER.** — When the local agent of an insurance company has actual knowledge of the falsity of an answer to a question in the application for insurance which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the policy on the ground of a false warranty in relation to such answer.

**INSURANCE — KNOWLEDGE OF AGENT — APPLICATION.** — An accident insurance company cannot escape liability under a policy issued by it, on the ground that the insured, who was deaf, signed an application stating that he was free from bodily infirmity when the company's agent who filled out the application had full knowledge of the physical condition of the insured at the time.

**ACTION on a policy of accident insurance.** Judgment for plaintiff, and the defendant appealed.

*W. W. Fuller and J. Parker*, for the plaintiff.

*J. S. Manning*, for the defendant.

**EVERY, J.** Though in some of its features there are slight differences between the case presented by this appeal and that considered when a new trial was awarded to the plaintiff at September term, 1890 (107 N. C. 240; 22 Am. St. Rep. 878), the main question involved is the same. Under the guise of a second appeal, the defendant company insists that this court shall review and overrule its former decision, as if it were a rehearing.

There is no branch of the law as to which, in all of its ramifications, there is so much conflict in the rulings of the various courts of appeal, and so great a diversity of opinion amongst respectable text-writers, as that governing the rights and liabilities of insurers.

When the universal custom was that the underwriter sat in his city office and issued policies of insurance, relying solely upon the representations of the applicant for information, whether as to his own physical state or as to the value, condition, and surroundings of his buildings, the insurer would have dealt at a great disadvantage with the unreliable class of his customers, if a contract procured by false representations had not been declared fraudulent and void, or if the disregard of stipulations intended to insure the observance of ordinary care in the habits of a person or the use of a building had not been held sufficient to defeat a recovery upon the

death of the person or the destruction of the property insured. But when, in the new order of things, the active competition between companies brought to every man's door a soliciting agent, furnished with instruction and advised as to his duty by the best trained business men and ablest lawyers in the country, the shrewdest and most unscrupulous of applicants could hope to get no advantage, and the untrained or uneducated among the number labored under a decided disadvantage in answering questions, not always comprehended in all of their bearings, and in receiving subsequently from its chief office, in a distant city, the contract of the company, limiting its own liability and imposing new duties upon the insured by means of conditions never heard of before the issuing of the policy, and often never read, or imperfectly understood afterwards. *Ubi eadem ratio, ibi idem jus*. When custom reverses the position of the parties, it would be strange if the law should undergo no modification.

The local agent of the defendant company testifies that with a knowledge of the deafness of the plaintiff, he filled out his application for an accident policy, signed his own name on the back of it, and forwarded it to the principal office in New York. The policy came in due course of time and was delivered to the plaintiff, who paid all of the premiums assessed against him, until he was so seriously wounded in his arm by the accidental discharge of a gun, in the hands of a friend, as to make amputation necessary. The company took a receipt by way of compromise, which, under the findings of the jury, is not evidence of payment, and as there was no exception to the rulings or charge involving the question of payment or satisfaction, we are brought to the consideration of the leading point. In the application for membership is the following paragraph: "I have never had, nor am I subject to, fits, disorders of the brain, . . . or any bodily or mental infirmity, except had an attack of rheumatism six years ago."

The defendant now contends that the representation by the plaintiff that he was free from bodily infirmity was false and fraudulent, and constituted a material inducement to the defendant to issue the policy. Ordinarily, the defendant could avoid the performance of the contract by showing the falsity of a material statement in the application. But the plaintiff, where representations contained in the application are admitted to be untrue, may rebut the presumption of fraudulent intent arising from such admission, by showing that the local

agent of the company, with full knowledge of the falsity of the statement, entered the answers of the insured and forwarded the application, approved by his own indorsement. We cannot give the sanction of this court to the doctrine that a local agent may scream into the ear of a deaf person solicitations to apply for an accident policy, write for him an answer, which he knows at the time to be untrue, to a question in the application, procure the policy, receive the premiums as they fall due, and when the insured becomes prostrate from a wound, stand aside at the bidding of the principal and allow it, with the premiums in its coffers, to avoid the contract on account of a statement known by the agent to be false when he prepared it for the applicant's signature. The reason which induced the courts to guard the underwriter against misrepresentations as to facts within the peculiar or exclusive knowledge of applicants no longer exists, when the agent of the insurer, on the ground, has as full knowledge of the truth or falsity of an application prepared by him as has the insured. *Cessante ratione, cessat et ipsa lex*. Where the local agent of a company has actual knowledge of the falsity of an answer to a question in the application which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the contract on the ground of false warranty: 1 Am. & Eng. Ency. of Law, 333; 1 May on Insurance, secs. 140-143; 2 May on Insurance, secs. 497-501; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417; 93 N. C. 240; *Hornthal v. Western Ins. Co.*, 88 N. C. 73; *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Eggleston v. Council Bluffs Ins. Co.*, 65 Iowa, 308; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Mullin v. Vermont etc. Ins. Co.*, 58 Vt. 113; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361; *American Cent. Ins. Co. v. McCrea*, 8 Lea, 513; 41 Am. Rep. 647.

It is not material whether we say that the conduct of the local agent amounts to a waiver or works an estoppel on the insurer, as the authorities are in conflict upon the point: 1 May on Insurance, sec. 143; 2 May on Insurance, sec. 498. Certain it is, that in such cases the knowledge of the agent is imputed to the principal, and "to deliver a policy with a full knowledge of facts, upon which its validity may be disputed, and then insist upon those facts as a ground of avoidance, is to attempt a fraud": 2 May on Insurance, sec. 497. The agent necessarily discovered, while negotiating with the plaintiff, that the latter was deaf; and it would be as unreasonable to presume that both the agent and the applicant intended to affirm that to be true

which they knew to be false, as that such a patent defect as the loss of an eye in a horse did not exist: *Leslie v. Knickerbocker L. Ins. Co.*, 5 Thomp. & C. 193; *American L. Ins. Co. v. Mahons*, 21 Wall. 152; *Brown v. Gray*, 6 Jones, 103; 72 Am. Dec. 563; *Fields v. Rouse*, 3 Jones, 72.

We do not propose to go behind the verdict and the instruction upon which it was founded, and avoid the reaffirmation of the principles announced on the former hearing of this case, by determining what is a bodily infirmity, since, conceding deafness to come under such designation, we think that there was no error in the rulings of the court below. As already intimated, it is immaterial whether we declare that the agent, by his conduct, waived objection to the inaccurate statement, or that by writing it down, or having full knowledge of the real truth of the matter, his conduct operated to estop the company, since, in view of what occurred when the application was made out, and before, the avoidance of liability under the contract, because of the infirmity known by the agent to exist, would be fraudulent and unjust. There is no error.

Affirmed.

**INSURANCE — NOTICE TO AGENT WHEN IMPUTED TO THE INSURED.** — Where an agent, with full knowledge of all the facts, induces an applicant for insurance to make untrue answers in his application, or himself makes false answers to appear in the written application, after having been correctly informed of the real facts by the applicant, notice of the circumstances is imputed to the insurer, who will be estopped to seek an avoidance of the contract: Note to *Follette v. United States M. A. Ass'n*, 22 Am. St. Rep. 883. As to when an insurance company is bound by notice to or knowledge obtained by its agents, see *Hagan v. Merchants' etc. Ins. Co.*, 81 Iowa, 321; 25 Am. St. Rep. 493, and note; *Butz v. Ohio Farmers' Ins. Co.*, 76 Mich. 263; 15 Am. St. Rep. 316, and note; *Menk v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 153, and note; note to *Beal v. Park Fire Ins. Co.*, 82 Am. Dec. 722, 723; *Morrison v. Insurance Co. of N. A.*, 69 Tex. 353; 5 Am. St. Rep. 63; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233; *Deitz v. Insurance Co.*, 31 W. Va. 851; 13 Am. St. Rep. 909, and note; note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 229-234; *Karelsen v. Sun Fire Office*, 122 N. Y. 545; *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150. The company cannot be charged with knowledge of facts ascertained by its agent in matters in no manner connected with his agency: *St. Paul etc. Ins. Co. v. Parsons*, 47 Minn. 352; nor with knowledge of things learned by an insurance broker, while he was acting as the agent of the assured: *East Texas Ins. Co. v. Brown*, 82 Tex. 631.

**INSURANCE — FRAUD OR MISTAKE OF AGENT WITH RESPECT TO THE APPLICATION:** See note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 229-234. A policy will not be avoided by misrepresentations contained in the application for insurance, for which the company's agent, by reason of fraud or mistake, is responsible, the assured being guilty of no fraud or bad faith: *Sprott v. New Orleans Ins. Ass'n*, 53 Ark. 215; *Rogers v. Phenix Ins. Co.*, 121

Ind. 570; *Phenix Ins. Co. v. Stark*, 120 Ind. 444; *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150; *State Ins. Co. v. Jordan*, 29 Neb. 514; *Centennial L. Ass'n v. Parham*, 80 Tex. 518; *Tarbell v. Vermont Ins. Co.*, 63 Vt. 53. But one must be held to the terms of his policy after he has received it into his possession; *Centennial etc. Ass'n v. Parham*, 80 Tex. 518. The mere knowledge of an insurance agent, through whom the policy was procured, at the time the application was made, that answers of the applicant therein written were false, will not prevent the company from setting up the breach as a defense to an action upon the policy; *Clemans v. Supreme Assembly*, 131 N. Y. 495.

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### TURNER v. MEBANE.

[110 NORTH CAROLINA, 413.]

**MORTGAGES—LIEN—MOVING HOUSE OFF MORTGAGED PROPERTY.**—Removing a house from mortgaged premises does not impair the lien on the house, and when it is sold in its new *situs*, under a decree foreclosing the mortgage, the purchaser may again remove it.

**FORECLOSURE of mortgage.** Judgment for plaintiff, and defendant appealed.

*J. W. Graham*, for the plaintiff.

*C. D. Turner*, for the defendant.

CLARK, J. The defendant mortgagor moved the house from the mortgaged premises across the road to another tract, also belonging to him, but not covered by the mortgage. This certainly could not impair the mortgage lien upon the house. If it could, in these days when house-moving machinery has been so greatly perfected, there would be a serious impairment of the security of all mortgages on improved real estate. The court decreed a sale of the house in its new *situs* under the mortgage, with leave to the purchaser to remove or roll the building off again. We can perceive no grounds, legal or equitable, upon which the defendant can object to this. The plaintiff does not ask for more, and the rights of third parties are not involved.

It does not appear that the building was attached to the freehold, and it is unnecessary to discuss the effect of such attachment in this case, if any.

No error.

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THE PRINCIPAL CASE lays down the rule that the removal of a building from mortgaged land to other land owned by the mortgagor does not impair the lien of the mortgage upon the house, because, says Mr. Justice Clark, "if it could, in these days when house-moving machinery has been



so greatly perfected, there would be a serious impairment of the security of all mortgages on improved real estate." The opinion is meager, citing no authorities whatever, but nevertheless enunciated, we think, the correct doctrine, inasmuch as the severed house did not pass into the hands of an innocent third party, but remained the property of the mortgagor: *Partridge v. Hemmaway*, 89 Mich. 454; *ante*, p. 322, and note. This case is perhaps distinguishable from *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387, where the severed building was sold to a *bona fide* purchaser by the mortgagor, thereby exonerating the house from the lien of the mortgage.

## STATE v. KITTELLE.

[110 NORTH CAROLINA, 560.]

**INTOXICATING LIQUORS — SALE TO MINORS — LIABILITY OF PRINCIPAL FOR SALE BY AGENT.** — A licensed liquor dealer is criminally liable for the unlawful sale of intoxicating liquor to a minor by his clerk or agent, and the fact that the sale was made without his knowledge and contrary to his instructions is no defense.

**INDICTMENT** for selling intoxicating liquor to a minor. The defendant, Kittelle, a licensed retail liquor dealer, employed two clerks in his bar-room, both of whom were indicted with him. The prosecuting witness testified that he purchased beer from one of the clerks, — he did not remember which one; that Kittelle was not present at the time, and that he (the witness) was unmarried and under twenty-one years of age. The defendant, Kittelle, testified that he had given his clerks special and express instructions not to sell liquors to minors, or on Sunday, and in every manner to comply with the law; that he had closely scrutinized the conduct of his clerks, and if liquor had been sold to any minor, it was done without his knowledge, and contrary to his instructions and expressed wishes. Verdict of conviction, and judgment thereon, from which defendant appealed.

*Theodore F. Davidson*, attorney-general, for the state.

*Burwell and Walker*, *H. C. Jones*, and *Osborne and Maxwell* for the defendant.

**CLARK, J.** The Code, sections 1077 and 1078, makes it a misdemeanor for any dealer in intoxicating liquor to sell, directly or indirectly, or give away such liquor to any unmarried person under twenty-one years of age, knowing such person to be under that age, and that such sale or giving away shall be *prima facie* evidence of such knowledge; and further,

that the father, mother, guardian, or employer of a minor to whom intoxicating liquor shall be sold or given away may maintain an action for exemplary damages, and that in no case can the jury award the plaintiff a less sum than twenty-five dollars.

The defendant contends that no one can be held criminally liable for an act which is done without his knowledge or consent. This is the strength of his contention. It is, in substance, that guilt cannot be attributed to him in this matter, because guilt consists in the intention, and that he had no intention to violate the law, because he neither knew of nor consented to the sale. There is, however, a well-defined distinction between those acts which are criminal only by reason of the intent with which they are done, and those in which the intent to commit the forbidden act is itself the criminal intent. As to this very matter of the sale of spirituous liquor to minors, it has often been held that the lack of intention to violate the law did not exculpate, if, in fact, the defendant did the act, or authorized it to be done, which constituted a breach of the law: *State v. Wool*, 86 N. C. 708; *State v. McBrayer*, 98 N. C. 619; *State v. Scoggins*, 107 N. C. 959; *State v. Lawrence*, 97 N. C. 492; *Farrell v. State*, 32 Ohio St. 456; 30 Am. Rep. 614, and numerous cases cited in the note thereto.

A principal is *prima facie* liable for the acts of his agents done in the general course of business authorized by him, as where a bar-keeper sells liquor, or a clerk sells a libel, or prints one in a newspaper: 1 Wharton's Crim. Law, 247, 341, 2422. And a vendor of spirituous liquors is indictable for the unlawful sale by his agent employed in his business, because all concerned are principals: 2 Wharton's Crim. Law, 1503. In *Carroll v. State*, 63 Md. 551, it is held that if, in the conduct of the business of selling liquors, a prohibited sale is made by the agent to a minor, the principal cannot shield himself from liability on the ground that his agent violated his general instructions, and did not inquire or was deceived by the purchaser as to his age; that while deriving profit from the sale, the principal cannot delegate his duty to know that the purchaser is a lawful one to the determination of an agent and be excused by the agent's negligence or error; that intention not being an essential ingredient of the offense, the principal is held bound for the acts of his agent in violation of law while pursuing his ordinary business as such agent; being engaged in business where it is lawful to sell only to such persons as

are not excepted by law, it is his duty to know when a sale is made that it is to a properly situated person, and therefore it is his duty to trust nobody to do his work but some one whom he can safely trust to discharge his whole duty, and if he does not do so, the law holds him answerable. The same is held in *State v. Denoon*, 31 W. Va. 122; *State v. Dow*, 21 Vt. 484; and to the same effect are numerous other decisions: 11 Am. & Eng. Ency. of Law, 718.

The same principle of the principal being criminally liable for the misconduct of his agents applies to many other offenses. In the leading case of *Rex v. Gutch*, Moody & M. 433, cited in 1 Taylor on Evidence, 827, which was a prosecution for libel, Lord Tenterden said: "A person who derives profit from, and who furnishes the means for carrying on, the concern, and intrusts the business to one in whom he confides, may be said to have published himself and ought to be answerable."

In *Redgate v. Hayes*, L. R. 1 Q. B. Div. 89, the defendant was charged with suffering gaming to be carried on upon her premises. She had retired for the night, leaving the house in charge of the hall porter, who withdrew his chair to another part of the hotel and did not see the gaming. It was held that the landlady was responsible. The same principle was maintained in *Mullins v. Collins*, L. R. 9 Q. B. 292, where the servant of a licensee supplied liquor to a constable on duty, and the court held the licensee answerable, though he had no knowledge of the act of his agent.

In the present case, had the defendant himself sold the liquor to the minor, he would be fixed *prima facie* with the knowledge that the purchaser was a minor. The contention of the defendant that such *prima facie* knowledge is rebutted by the fact that he was not personally present omits consideration of the fact that the knowledge of the agent is the knowledge of the principal. This is always true, though the intent of the agent, when material, is not necessarily the intent of the principal. The law requires the county commissioners to issue license to retail liquor only to persons whom they shall find properly qualified. This is construed in *Muller v. Commissioners*, 89 N. C. 171, to mean, that, among other things, the applicant must possess a good moral character. It would be a vain thing to require the commissioners to take the pains and trouble to ascertain whether the applicant is properly qualified, and to reject him if he is not, if the licensee may immediately upon opening his bar set up as his clerk another

applicant who has, perhaps, just been rejected by the county commissioners, after due inquiry, as not properly qualified, and may claim, upon a violation of the law by such clerk, that he, the licensee, is not liable, because he had instructed his clerk when he employed him not to violate the law, had often visited his bar-room without seeing any sales made to minors, and no one had informed him that such sales were being made. If such were law, the safeguard intended to be obtained by placing the licensing power in the hands of the county commissioners, who shall issue license only to those whom they find "properly qualified," would be a delusion and a sham. If the only safeguard is an indictment of the person actually selling, that exists against the principal, and there would be no need of requiring a license of any one.

The defendant's clerks had no license to retail liquor. Every sale by them to any one is indictable, and the defendant is indictable with them as co-principal (there being no accessories in misdemeanors) for aiding and abetting them in their illegal traffic, unless it is true that their sales are his sales. If it is valid to protect such sales by them under authority of the license to him, then their sale is also his sale to make him liable if the terms of the license are not complied with. The licensee cannot put his clerks in his shoes, give them the benefit of the license issued to him upon the confidence reposed in his moral character, and not be held responsible for their violations of the law in the scope of such employment. He cannot set up his bar, receive its profits, and abdicate his duties. The duty is imposed on him that the law shall not be violated by a sale to a minor. Here the sale was to a minor. The defendant put it in the power and authority of the clerk to sell. It was the defendant's own risk and peril that he was not present, and that he did not make the sale himself. That his agent did not obey his instructions, and negligently or purposely violated the law, does not exculpate the defendant. The law has been violated. It looks to the man it authorized to sell, — the licensee, — this defendant. The sale by the clerk was in law a sale by the principal, and the violation of the law must be laid upon the defendant, who gave the clerk the means and the authority to sell, but did not take proper care in selecting his agent, or use means sufficient to prevent illegal sales by him. It will not do for the defendant to say that he authorized legal sales and the clerk made illegal sales. The law authorized the defend-

ant to sell. Whether his sales are legal or illegal is at his peril, and it can make no difference whether he sells by his own hands or through an agent whom he improperly selected or insufficiently supervised. The violation of the law is at the door of the man whom alone the law authorized to sell. The agent or clerk (if identified) is also liable as aiding and abetting in the illegal sale: *State v. Wallace*, 94 N. C. 827.

Either the licensee is responsible for illegal sales by the clerk (*State v. McNeeley*, 60 N. C. 232), or the licensee has no authority under his license to sell through the medium of a clerk, and all sales must be by the person himself whom the commissioners have found "properly qualified," and have licensed to sell. Any other view of the matter would be illogical, and would be a virtual repeal of the law. It would empower the bar-keeper to appoint others as bar-keepers, whom, perhaps, the county commissioners would have refused to license. However well "qualified" the commissioners may find the party whom they license, there is no guaranty that he will select clerks who are so, or that he has the energy, the judgment, or the skill to prevent violations by them. The law will look to the man it licenses, and he must select his clerks and be responsible for them at his peril.

In *Carroll v. State*, 63 Md. 551, the supreme court of Maryland, upon a state of facts and a statute almost identical, comes to the same conclusion; it says: "When the agent, as in this case, is set to do the very thing which, and which only, the principal's business contemplates, namely, the dispensing of liquors to purchasers, the principal must be chargeable with the agent's violation of legal restrictions on the business. His gains are increased, and he must bear the consequences. The fact that he has given orders not to sell to minors only shows a *bona fide* intent to obey the law, which all the authorities say is immaterial in determining guilt. The court may regard such fact, in graduating punishment, when it has a discretion. The cases, therefore, which hold that such orders will exculpate the principal are inconsistent with the rule that in such cases the intent is immaterial. If intent is not an ingredient in the offense, it logically follows that it must be immaterial whether such orders are given or not, for he who does by another that which he cannot lawfully do in person must be responsible for the agent's acts. In fact, it is his act. It cannot be, that by setting another to do his work and occupying himself elsewhere and otherwise, he can reap the benefit

of his agent's sales, and escape the consequences of the agent's conduct. It would be impossible to effectually enforce a statute of this kind if that were allowed, and it would speedily become a dead letter." This case cited also *McCutcheon v. People*, 69 Ill. 606, in which it is said: "It is immaterial whether the sale was made by an appellant or an agent. The agent had no license to sell to any one, and it is only lawful for him to do so in the name and by the authority of his principal, and the presumption is conclusive that the agent or servant acted within the scope of his authority in making the sale." This latter case is cited and expressly followed in *Noecker v. People*, 91 Ill. 494. To the same purport, that "when, in the absence of a saloon-keeper, a sale of liquor is made by his bar-tender, the directions of the former not to sell to minors will not exempt him from liability for the sale," are *Mogler v. State*, 47 Ark. 110; *Edgar v. State*, 45 Ark. 356; *Waller v. State*, 38 Ark. 656; *Loeb v. State*, 75 Ga. 258; *Snider v. State*, 81 Ga. 753; 12 Am. St. Rep. 350; *Whitton v. State*, 37 Miss. 379; *Riley v. State*, 43 Miss. 397; *Dudley v. Sautbine*, 49 Iowa, 650; 31 Am. Rep. 165; and many others, though in these cases the statute varies somewhat from that in this state.

In *People v. Roby*, 52 Mich. 577, 50 Am. Rep. 270, and *People v. Blaks*, 52 Mich. 566, it is held that "the owner of a saloon whose clerk, without his knowledge or consent, but while he was on the premises, opened it on Sunday morning to clean it out, and sold a drink to a customer, may properly be convicted of keeping a saloon open on Sunday." The opinion in the first-named case is delivered by Cooley, C. J., the eminent writer on constitutional limitations, and in the course of it he says: "As a rule, there can be no crime without a criminal intent, but this is by no means a universal rule. One may be guilty of the high crime of manslaughter when his only fault is gross negligence, and there are many other cases where mere neglect may be highly criminal. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties, irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible"; and numerous incidents and precedents are cited to support the proposition. *Bona fides* was held also to be no defense in an indictment for extortion: *State v. Dickens*, 2 N. C. 468 (407); nor for unlawful voting: *State v. Boyett*, 10 Ired. 336; *State v.*

*Hart*, 6 Jones, 389; nor generally in statutory offenses: *State v. Presnell*, 12 Ired. 103.

The defendant relies on *State v. Privett*, 4 Jones, 100. There the court charged the jury that if the principal instructed his clerk not to sell, he would not be liable for the sale by the clerk unless such instructions had been abrogated expressly, or by a course of conduct which would tacitly amount to the same. The appeal by the defendant, of course, could not bring up for review this charge which had been made in his favor—but Nash, C. J., takes occasion to say: "The defendant has; as we think, no cause to complain of his honor's charge; it was as favorable to him as it could have been." And he adds: "As to the effect of general instructions in such a case as this, it is not necessary for us to give an opinion. But we can say that if they are to have the effect given to them by the charge in this case, and in the argument of the defendant's counsel, the act under which this prosecution is had will be very easily evaded." This is a strong intimation, we take it, that if the correctness of the charge had been before the court it would have been reversed. Accordingly in *State v. McNeeley*, 60 N. C. 232, it is held that a licensee may have a clerk or agent, "he remaining responsible for the good conduct of his agent." The defendant also relied upon *State v. Divine*, 98 N. C. 778, in which it is held that a statute making one railroad officer criminally responsible for the act of another was unconstitutional. We do not see the analogy. If the statute had forbidden the doing of a certain act by a railroad company, and provided that if it was done by any of the officers or agents of the company in the scope of their employment, the corporation, being the principal, should be indictable, the case would have been on "all fours" with the present, and the act constitutional. Indeed, it is pointed out in that very case that the principal might be held criminally liable for the acts of the agent, but a co-employee could not. Without any express statute, corporations have been repeatedly indicted for the negligence, or nonfeasance, and misfeasance of their agents, when neither the corporation nor its managing officers had any intention to violate the law, and, in fact, had given instructions forbidding such acts. The corporation is held criminally liable, such instructions being, as in the present case, held not a matter of defense, but in mitigation of punishment. It is needless to cite cases. The doctrine is settled law.

The retailing of liquor is not a matter of natural right, and

the whole subject is within the police power of the state, which can leave it unrestricted or hedge it about with regulations, or forbid it entirely: *Mugler v. Kansas*, 123 U. S. 623, and countless other cases. When regulations are imposed, as in this case, the licensee is criminally liable for their non-observance. The defendant was found by the county commissioners "qualified," and a license was issued to him upon the personal trust that he would conduct the business according to the regulations. The sale here made to a minor was a violation of that trust, and a violation of law. It is no defense that the defendant had no intention to violate the law. "Good intentions" are said by the proverb to be the pavement of another place, but they are not a sound one for a bar-room. The law has been violated. It looks to the man it intrusted with the management of this business, and holds him liable. It is immaterial whether his liability is based upon his negligence in permitting the sale, or upon the principle of agency, or upon both, for the defendant is liable for a negligent sale from insufficient supervision of an agent, as much as if he had ordered the sale. If the clerk, as Judge Cooley says *supra*, being in possession of the keys, opened the saloon on Sunday for traffic, the licensee could not excuse himself from liability by his absence or ignorance, nor can he do so in the present case of a sale to the minor by being temporarily absent from the room. The defendant chose to seek for and assume the liabilities of the calling of a saloon-keeper that he might enjoy its profits. He cannot be allowed to enjoy its profits and assign its duties and liabilities to another.

The elaborate argument for the defendant is based on the fallacy that our statute requires a *scienter* to be proven. This would be so, if the section was abruptly cut in two. But taken as it stands, when the state has proven an illegal sale as to a minor, the case is made out. The statute only permits the defendant to withdraw himself from liability by showing that the actual seller did not know that the purchaser was a minor. This was not done in this case. The argument made for the defendant, that a merchant might, on the same grounds, be convicted of a larceny by his clerks, is not very complimentary to the defendant, and it is as little beneficial to him. If, however, the law forbade larceny, except upon a license (if it is possible to conceive such a thing), granted after examination, and theft by all not so licensed, or even by them from minors, were indictable, and the clerks, without being themselves



licensed, committed a theft by virtue of the defendant's license, from a minor, then only would the case be analogous.

The evidence is uncontradicted that the sale was to an unmarried person who was a minor. No exception was made as to the charge in regard to the purchaser being unmarried, and hence we cannot pass upon a point not raised, and about which, indeed, there was no controversy. Neither the whole of the charge nor of the evidence is stated to have been sent up, only so much as is necessary to present the exceptions made.

The fact that the clerks were acquitted because it could not be determined which one sold to the minor is a strong argument against the defendant. If the principal were not liable for all illegal sales made under his license, he could, by having several clerks, or changing them often, easily evade punishment for illegal sales. The law looks to the responsible party—the licensee—who has been permitted to carry on the calling, and who is held for its proper exercise. He is to receive the money from the illegal sales, and he can always be identified.

The amount of supervision exercised by the defendant here is a matter in mitigation, to be considered by the court in passing judgment. It was not enough to prevent the illegal sale, and hence is not a defense.

No error.

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AVMY, J., concurred in a lengthy opinion, of which the following is a synopsis. He quoted section 1077 of the North Carolina code, which provides that it shall be unlawful for any dealer to sell or give away intoxicating drinks or liquors, either directly or indirectly, to any unmarried person under the age of twenty-one years, knowing his age, and providing that such sale or giving away shall be *prima facie* evidence of such knowledge; and then said, in effect, that in construing section 1076 of the same code, making a sale "by the small measure, in any other manner than as prescribed by law," a misdemeanor, the courts have never hesitated to look behind specious evasions, in order to determine the real quality of the act. "Whether there was direct or positive proof of the actual criminal purpose of the dealer, or such testimony as raised a presumption only of his unlawful intent to evade, or to carelessly permit his agents to evade, its provisions," instructions to juries that such evidence if believed would warrant a conviction have always been upheld; *State v. McMinis*, 83 N. C. 668; *State v. Kirkham*, 1 Ired. 384; *State v. Potest*, 86 N. C. 612.

"Conceding, for the sake of argument, as has been contended on behalf of the defendant, that where a legislative act, in unqualified terms, makes a guilty intent of the essence of the offense, the burden is on the state to prove the *scienter*, the peculiar proviso to our statute would involve a novel question, not presented, as far as my investigations have extended, in any of the cases involving the construction of liquor laws that have been cited. It is

too clear and well settled to admit of argument, that the mere proof of the sale to a minor by a clerk raised a presumption of knowledge on the part of the clerk that the purchaser was under twenty-one years of age, notwithstanding the express requirement that the act should be done 'knowingly'; *State v. Scoggins*, 107 N. C. 959. If the artificial force of this *prima facie* proof extends both to agent and principal, and the guilt of the servant is thereby imputed to the employer, the presumption of the willful violation of the statute by the former can be rebutted only by showing a want of knowledge of the age of the purchaser on the part of the actual seller, not by proof that the owner was absent, in no wise participated in the act, and had expressed his disapproval of such conduct, as in this case. The clerk who made the sale, if the testimony had identified him, and he had chosen to risk his case upon the credibility of evidence offered to identify, might have been convicted under the statute making guilty knowledge of the essence of the offense, by the force of the presumption, when, in fact, he honestly believed the purchaser was an adult. The proviso makes 'such sale to a minor *prima facie* evidence of such guilty knowledge,' not solely against the active agent who conducted it, but against any one who might have been convicted upon the evidence adduced, if both the word 'knowingly' and the peculiar qualifying proviso by which it is followed had been omitted by the legislature. In that case it would have been unnecessary to prove the *scienter* at all, while, under the statute as it is, it is essential to do so but *sub modo*, viz., by proof sufficient to raise a presumption of guilty knowledge, and that presumption arises when the fact of being a minor is proved. Is the guilty knowledge of selling to the minor, the presumption of which arose on proof of the age, imputed by the artificial effect of the statute to the dealer as well as to the clerk? If such is the proper interpretation of its language, it is needless to discuss the question of applying the doctrine of *respondet superior* to criminal prosecutions." In Illinois the statute provides that "whoever, by himself, clerk, or servant, shall sell intoxicating liquor, etc., shall be liable"; and it has been there decided that evidence to show that the sales to a minor were made by the dealer's clerk was properly excluded: *Noecker v. People*, 91 Ill. 494. In Georgia the statute provides that "no person, by himself or another, shall sell, etc., or furnish any minor or minors spirituous, intoxicating, or malt liquors," etc.; and it was there determined that a conviction of a dealer for a sale by his clerk in his absence, and without his knowledge or consent, was valid: *Loeb v. State*, 75 Ga. 258; *Snider v. State*, 81 Ga. 753; 12 Am. St. Rep. 350.

The Arkansas statute makes it a misdemeanor to be "interested" in the sale of liquor to a minor without the written consent or order of the parent or guardian, and it was there decided that the dealer's absence when his bartender sold liquor to a minor was no defense: *Mogler v. State*, 47 Ark. 106; *Waller v. State*, 38 Ark. 656; *Edgar v. State*, 45 Ark. 356.

In connection with these authorities, Judge Avery said: "I think that the purposes of the legislature in inserting the words 'directly or indirectly' in the statute was not needlessly to notify the people that the court would tolerate no attempts at evasion by resorting to artifice, but to meet the very difficulty which seems to have suggested itself to law-makers in other states, and express the same idea conveyed in Illinois by using the words 'by himself, clerk, or servant,' in Georgia 'by himself or another,' and in Arkansas by extending the criminal liability to every one who might be interested in the sale to a minor. If, therefore, the words 'directly or indirectly' are susceptible of two interpretations, and might be construed to have been aimed either

at evasions by artifice or at violations perpetrated through agents negligently selected, we should adopt that construction which harmonizes with other legislation upon the same subject, and which manifestly looks to the end of intrusting the business which had required so much legal supervision to men whose characters would be a guaranty that the power would not be abused. This guaranty would be worthless, if they could shift the responsibility upon agents who could carelessly or purposely override all laws imposing safeguards on the business. It would seem an unaccountable oversight if intelligent representatives in our legislatures had attempted to protect the public against nuisance by requiring that all persons applying for licenses, as an essential prerequisite to obtaining the privilege, should satisfy the county commissioners that they had established good moral characters, and for a generation past had left them at liberty to employ the most immoral men in the community to conduct the business without incurring liability for such flagrant violations of the liquor laws by these agents in selling to minors. Why require the solemn mockery of proof of moral character by the applicant, if, in an hour after the license is issued, he can constitute the worst man in the community his chief clerk, exhort him to obey the laws of the land, bow himself out, and leave the employee free from oversight to sell on commission till the term of license expires."

In *People v. Utter*, 44 Barb. 172, the court said "that in order to convict, proof must be made on the part of the defendant of an intent to violate the statute. Where, as in this case, the sale is not made by the defendant personally or in his presence, the presumption is not overcome by merely showing that the sale was made on his premises by his bar-tender.

Criticising this case, Mr. Justice Avery said: "But if that were a correct statement of the law, in our case the presumption of innocence, which the law raises in favor of the accused, is rebutted by force of the proviso, the effect of which is intended to be felt, not simply against the servant, but against one who has proved unmindful of the high trust confided to him by society in employing unreliable agents. The law, which looks so closely to his character, does not intend that he shall reap the profits of illicit sales and escape the responsibility for the consequent injury to society. This question does not depend upon analogies drawn from the construction given to statutes of other states widely different from our own. It is the duty of this court to give a construction to our own act, which is peculiar in two important respects: 1. In the use of the words 'directly' and 'indirectly,' in order to put the dealer into the shoes of the agent or servant; and 2. In neutralizing, by certain evidence, the force of the word 'knowingly' by the proviso following immediately after it, and imposing upon the employee, as well as upon the employer, who is acting 'indirectly' through him, the burden of showing that the former did not have knowledge of the fact, proved otherwise to be true, that the purchaser was a minor. Where the presumption of the *scienter* may be raised by proving other facts, upon adducing the requisite proof the burden may be shifted so as to dispense with the necessity of offering, in behalf of the state, any direct evidence to show intent at all. Just as soon as the presumption of the *scienter* is raised, then the prosecution, until rebutting proof is offered, stands in the same position as if the statute had been silent as to proof of intent."

Under a statute providing that it shall constitute a misdemeanor for persons to neglect to keep and repair their fences during crop time in the manner provided by law, it has been expressly decided that a foreman acting under direction of his employer is not liable under the statute, but that the

absent employer is: *State v. Taylor*, 69 N. C. 543; *State v. Bell*, 3 Ired. 506; *Ree v. Gutch*, 1 Moody & M. 437. "This is a direct recognition of the principle that where no proof of unlawful intent is required, or where the presumption of guilty knowledge is raised in a way provided by statute, a defendant, who was not present when the act was done or the duty omitted by another, the doing or omission of which constitutes in law the criminal offense, may nevertheless be convicted of it. So long as the presumption of guilty knowledge on the part of the employee who made the sale remains un rebutted, the testimony, if believed by the jury, must be considered *prima facie* proof of the guilt of the absent hotel-keeper, just as the neglect of the overseer to repair fences is imputed to the absent planter, or as the criminal conduct of an employee was imputed to another, assumed by law to act through him, in the cases of indictment for sales to minors, cited above. The fact that our statute by its express terms makes the dealer responsible for the act of unlawful selling done indirectly through his servant, and imputes to him the purpose or neglect of the subordinate, easily distinguishes our case from those arising under statutes which contain neither this provision, that requiring express proof of intent, nor that specifying certain evidence that may raise a presumption of guilty knowledge."

Such are the statutes of Michigan, Mississippi, Maryland, Iowa, and other states, the decisions in many of which distinctly recognize the principle contended for in this opinion. Mr. Justice Avery did not contend that his view was sustained by the decisions of all of the American courts, and he cited *Anderson v. State*, 22 Ohio St. 305, and *Barnes v. State*, 19 Conn. 398, as being plainly in conflict with it. The Missouri statute, however, expressly fails to prohibit sales made by another, and the case of *State v. Shortell*, 93 Mo. 123, was decided upon that ground, thus distinguishing it from the present case at bar.

The cases of *People v. Schoffer*, 4 Hun, 23, *People v. Mahoney*, 4 Hun, 26, and *State v. Hayes*, 67 Iowa, 27, approve the principle contended for, and maintain that proof, which, according to the terms of the statute, raises a presumption of guilty knowledge, dispenses with the necessity of further evidence of intent. "Following the general current of more modern authority, and the giving to the law under which the indictment is drawn the construction of which it seems so clearly susceptible, I have eliminated the questions that have given rise to the most serious controversy. If the legislature had the power to declare that a sale made by a clerk should be deemed to have been made by his employer, and the words of the statute can be fairly construed to mean that it has so declared, then the necessity for discussing the general doctrine of the criminal responsibility of principals for the acts of agents done in the absence of the principals would seem to be obviated. If we were compelled to fall back upon general principles, we would find that after taking a survey of all the conflicting authorities, Wharton (2 Crim. Law, sec. 1503) states his conclusion as to the general liability of principals to indictment for unlawful sales by agents as follows: 'A shop or hotel keeper is indictable for an unlawful sale of spirituous liquors by a servant employed in his business, as all concerned are principals; nor in such a case is it any defense that the agent was directed by the principal not to make the particular sale complained of. Where the sale is not in the immediate line and direction of the principal's business, the fact of agency is only *prima facie* evidence of the principal's guilt.' The implication being, as is declared by other writers, that if the sale is made at a hotel bar by a clerk employed to attend to it in the regular course of the business, it will be deemed, for

all purposes, the act of the principal himself, who can avail himself of no defense that would not exculpate the agent. . . . I see no cause to apprehend danger from giving to our statute a reasonable interpretation, and one that will afford to society the protection that necessarily grows out of the consciousness of responsibility by dealers in intoxicating liquors for acts of their agents done in the line of that business. We will be following in the wake of our sister states of Arkansas, Iowa, and Georgia in construing our statute so as to carry out the manifest legislative intent, and at the same time we will reach such a conclusion as will be in harmony with the manifest purpose of the legislature in passing other kindred laws."

Mr. Justice Shepherd dissented from the opinion delivered by the majority of the court, on the ground that it involved a radical departure from well-settled legal principles, as illustrated by the current of authority, and established a most dangerous precedent, the effects of which cannot be well estimated in unsettling the old and well-defined safeguards of personal liberty. In his opinion, the conviction in the case at bar could only be sustained on the ground of the liability of the principal for the acts of his agent; and while the doctrine of *respondet superior* has been applied in some criminal cases, it has never been stretched so as to cover a case like the present one. Many statutes "in the nature of police regulations impose criminal penalties, irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." Under such statutes, the principal has been held conclusively liable for the act of his agent in the unlawful sale of liquor to minors in a very few of the states, while in others this rule has been expressly denied, necessitating amendments to the statutes, and it is only under the amended acts that the decisions cited in the opinion adopted were made. The law is directly opposite when a statute makes the criminal intent or knowledge an essential element of the crime, and "it is in the failure to observe this all-important distinction that the fundamental error of the court is to be found. All that has been so well said about the policy of the law in dispensing with the element of intent or *scienter*, and the consequent liability of the principal, is applicable to the class of cases mentioned by Judge Cooley, and clearly has no relation to the class to which the present case belongs, in which *scienter* is an indispensable requisite to a conviction. It is not a little remarkable that this very distinction is to be found in the authorities cited in the opinion of the court." This is instanced by the case of *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614, and the note thereto, which contains the following propositions: "1. When to an offense knowledge of certain facts is essential, then ignorance of these facts is a defense. 2. When a statute makes an act indictable, irrespective of guilty knowledge, then ignorance of fact is no defense"; and places *McCutcheon v. People*, 69 Ill. 601, one of the leading cases in support of the present decision, under the second proposition.

In *State v. McBrayer*, 98 N. C. 621, it was said: "It is only when the positive willful purpose to violate a criminal statute, as distinguished from a mere violation thereof, is made an essential ingredient of the offense, that honest mistake and misapprehension excuses and saves the alleged offender from guilt"; and to the same effect is *State v. King*, 86 N. C. 603; *State v. Wool*, 86 N. C. 708. "Having fully established the distinction above mentioned, I will now proceed to an investigation of the other authorities upon which the decision is based. The case of *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614, so far from sustaining, seems to be in direct conflict with the

view of the court, as it is there held, even under a statute which did not require any *scienter* or intent, that the defendant could show in his defense that the liquor he sold was represented to him as free from alcoholic properties, and that he sold it with that understanding and belief." The cases of *Carroll v. State*, 63 Md. 551, *People v. Roby*, 52 Mich. 577, and in the cases from Illinois, Arkansas, Georgia, West Virginia, Mississippi, and England, it is disclosed that the statutes involved do not require the existence of guilty intent or knowledge. The only case in any way sustaining defendant's guilt is that of *Redgate v. Haynes*, L. R. 1 Q. B. D. 89. In this case "Blackburn, J., however, used the following language: 'I agree that the mere fact that gaming was carried on on her premises would not render her liable to be convicted, because that is not "suffering" the gaming to be carried on, and if the justices were of a different opinion, they were wrong; but I think if she purposely abstained from ascertaining whether gaming was going on or not, or in other words, connived at it, that this would be enough to make her liable.' Of the same opinion was Lush, J., the other sitting judge, who said: 'The only question here is whether there was any evidence of such connivance, and I think there was.'"

In the case of *Whitton v. State*, 37 Miss. 379, the statute did not require guilty knowledge or intent, and the indictment was for selling liquor to an intoxicated person; the court said that "it was certainly necessary that the defendant should either have known, or have had good reason to believe, that the person to whom the liquor was sold was intoxicated at the time of the sale. . . . The passages cited from Wharton's Criminal Law are broad enough to sustain the position of the state, but I find that they are all based upon statutes which make the forbidden act indictable, irrespective of a guilty knowledge or intent, and that in some of the statutes it is expressly provided (as in West Virginia and Illinois) that a sale to minors by any person, 'by agent or otherwise,' is an offense against the criminal law. In West Virginia it is also provided that a sale 'by one person for another shall, in any prosecution for such sale, be taken and deemed a sale by both,' etc."

In *Mugler v. State*, 47 Ark. 110, it was expressly stated that the case was determined upon a statute changing the law to avoid the effect of the previous case of *Cloud v. State*, 36 Ark. 151, holding that a bar-keeper was not criminally liable for a sale of liquor made by his clerk in his absence and without his authority.

"In *Carroll v. State*, 63 Md. 551, the court said that 'it is not necessary to allege *scienter*, because it is not made an ingredient by the statute that the thing shall be knowingly and willfully done to make the violation of the statute an offense.' It is manifest that if the statute had required such an ingredient, the court would not have held the principal criminally liable. In *Barnes v. State*, 19 Conn. 398, the defendant was indicted for selling liquor to a common drunkard, and it appeared that the sale was made by the clerks of the defendant, and it was held to be error to exclude evidence that the defendant had given his clerks specific directions to sell no liquor to common drunkards."

In *State v. Wool*, 86 N. C. 708, the defendant was indicted for unlawfully selling liquor himself, and not by his agent, without the prescription of a physician, and no knowledge or intent is required by the statute to constitute the crime, nor is the liability of the principal for the act of his agent involved in the case.

The cases of *State v. McBrayer*, 98 N. C. 619, *State v. Scoggins*, 107 N. C. 959, *State v. Lawrence*, 97 N. C. 492, are all plainly distinguishable from the

case at bar, because they do not involve the sale of liquor by an agent, and because they do not involve the guilty knowledge or intent of the principal as to the acts done by himself or his agent. And the case of *State v. Neely*, Winst. 334, "only decides that a licensee may employ an agent, and that the latter will be protected, but that his assignee will not be protected. This case had no reference to any statute similar to the one in dispute here, as none was in existence at that time."

The cases sustain the proposition that "the master is never liable criminally for the act of his servant, done without his consent and against his express orders": 1 Bishop's Crim. Law, 219; *Rex v. Guich*, 1 Moody & M. 433; and "the master may avoid the effect of the sale by showing that he was not privy nor assenting to it, nor encouraging it": *Rex v. Almon*, 5 Burr. 2686; and to the same effect, *Rex v. Waller*, 3 Esp. 21; *General v. Siddons*, 1 Crompt. & J. 220.

In *Mullins v. Collins*, 9 Q. B. 292, cited in the opinion adopted by the court, "the distinction I have been endeavoring to draw is clearly recognized. The defendant was indicted for supplying liquor to a constable on duty, and it was held that the licensee was liable, although he had no knowledge of the act of his servant. Archibald, J., said that 'section 16 is one of a series of clauses, headed offenses against the public order, and must, therefore, be construed in the way most effective for maintaining public order. It contains three subsections, the first of which creates offenses which must be 'knowingly' committed, but the appellant has been convicted under the second subsection, where the word 'knowingly' is omitted. This seems to point to the conclusion that the licensed victualer will be liable for the act of his servant, although he himself has not knowingly committed an offense against the second subsection.' In view of these authorities, chiefly cited in the opinion, it would seem unnecessary to produce any others to sustain the position, that where the statute makes the guilty knowledge of the dealer an essential ingredient of the offense, the principal without such knowledge cannot be convicted by the act of his servant. Not a single authority has been produced where, under a similar statute, a conviction has ever been sustained under such circumstances, while most of the cases cited by the court abundantly sustain the opposite view. Mr. Bishop says (Bishop's Statutory Crimes, 1022; 1 Bishop's Crim. Law, 522, 523): 'Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege, or the government's evidence show, that he knew the fact; his being misled concerning it is a matter for him to set up in defense and prove. Quite different are the law and procedure where the statute has the word "knowingly," or the like; knowledge there is an element in the crime, the indictment must allege it, and the evidence against the defendant must affirmatively establish its existence.'" To the same effect, 1 Wharton's Crim. Law, 297. The following cases sustain the proposition that where an unlawful sale of liquor is made by a servant without the knowledge of his master, and in real opposition to his will, proof on his part that he in no way participated in, approved, or countenanced such unlawful act is sufficient to relieve him of any criminal liability therefor, and to justify his acquittal: 1 Bishop's Crim. Law, 220; *State v. Dawson*, 2 Bay, 360; *Ewing v. Thompson*, 13 Mo. 132; *Caldwell v. Sacra*, Litt. Sel. Cas. 118; *Commonwealth v. Nichols*, 10 Met. 259; 43 Am. Dec. 432; *Commonwealth v. Stevens*, 153 Mass. 421; 25 Am. St. Rep. 647; *Hipp v. State*, 2 Blackf. 149; *Commonwealth v. Briant*, 142 Mass. 463; 56 Am. Rep. 707; *Commonwealth v. Putnam*, 4 Gray, 16; *Commonwealth v. Dunbar*, 9 Gray, 298; *Byington v. Simpson*, 134 Mass. 169; 45 Am. Rep.

314; *Commonwealth v. Hayes*, 145 Mass. 289. The following text is found in 2 Am. & Eng. Ency. of Law, 711 et seq.: "A licensee to sell intoxicating liquors is bound, at his peril, to see that the conditions of the license are complied with by his servants or agents, but to render a defendant liable for sales made by agents or servants, a defendant's knowledge or consent must be shown." To the same effect are the cases of *People v. Utter*, 44 Barb. 170; *Anderson v. State*, 22 Ohio St. 305; *Commonwealth v. Nichols*, 10 Met. 259; 43 Am. Dec. 432; *Wetzel v. State*, 18 Ind. 35; *Wreidt v. State*, 48 Ind. 579; *State v. Hayes*, 67 Iowa, 27; *State v. Shortell*, 93 Mo. 123; *Commonwealth v. Wachendorf*, 141 Mass. 270. In the last case the court said: "It would require a clear expression of the will of the legislature to justify a construction of a penal statute which would expose an innocent man to a disgraceful punishment for an act of which he had no knowledge, which he did not in any way take part in or authorize, but which he had forbidden."

Mr. Justice Shepherd, in conclusion, expressed himself as follows: "When we consider that the cases cited are upon statutes which, like those referred to in the opinion, do not require a guilty knowledge or intent, and that they indicate very clearly that the great weight of authority, even upon such statutes, is against the contention of the state, and when we further consider, as I have already observed, that not one decision has been produced which dispenses with a guilty knowledge or intent where the law expressly requires it, I think it must be apparent that the doctrine of *respondet superior* has, in this case, been extended beyond the limits of precedent, and with all deference I will add, beyond the well-settled principles of the criminal law. It is said that any other ruling would lead to an evasion of the law in many instances, and that the principal should be held to such an accountability because of the trust reposed in him by reason of his selection by the county commissioners as a fit person to retail intoxicating liquor. It must be remembered that the public is not without protection, as the agent or servant who makes an unlawful sale is liable to be indicted and punished: *State v. Wallace*, 94 N. C. 829. The possible evils resulting from a failure to hold an innocent principal guilty is a matter which should be addressed to the law-makers; and if they see fit to do so, they may enact laws similar to those in West Virginia, Arkansas, Maine, Illinois, and other states, under which the principal is held to be chargeable with the guilty knowledge of the agent. It was because of the existence of the principle I am insisting upon that such laws were made, and that legislation was deemed necessary in this state in order to fasten a criminal liability upon the principal. Public policy may have much to do with the interpretation of statutory laws, but I do not see how it can control language which is not only free from ambiguity and doubt, but has universally been held to be susceptible of but one meaning when used in criminal offenses. If the policy to be subserved requires a conviction in a case like the present, it is very strange that such great pains should have been taken to defeat its object by explicitly requiring that the unlawful act should be accompanied with a guilty knowledge. The position of the state cannot rest upon public policy alone, but it must be based upon some other principle, and this principle must necessarily be that in criminal cases the actual or constructive knowledge of the agent is the knowledge of the principal. It is further argued that the act of the agent in selling to a minor makes out a *prima facie* case of knowledge, and, there being no evidence on the part of the agent in rebuttal, the principal must therefore be guilty. This is very true as to the agent, but it is a *petitio principii* to say that such constructive knowledge is the knowledge of the principal, as that is the very question we



are called upon to determine. It is plain, from our statute, that the presumption of *scienter* arises only as against the person who does the selling, and the law has been careful to provide that such a person may rebut the presumption and show the truth of the transaction. If the law, then, is so careful as to the actual vendor, it would be strange, indeed, if it did not display some solicitude for one who had no knowledge whatever of the particular transaction. It must be evident that the legislature never intended that any one should be convicted under this law without being permitted to show his innocence, and if the agent who does the selling could rebut the *prima facie* case of guilty knowledge which is raised by his own act, it would be a hard measure indeed to deny the same privilege to one who is admittedly innocent both of the unlawful act and the guilty knowledge. In providing that the unlawful sale should be *prima facie* evidence of knowledge, the law did not intend to dispense with the element of *scienter* as an ingredient of the crime. It simply shifted the burden of proof, reserving to the defendant the right to show his innocence. It was never intended, I think, to extend the *prima facie* case to one who did not commit the act, and at the same time put it in the power of the person who committed the act, either by neglect or connivance, to shut out all testimony whatever tending to show the absolute innocence of the party charged. I am very sure that the *prima facie* case applies only to the person making the sale; but if this is not true, and it is extended to the principal, why, pray, does not the right to rebut the *prima facie* case go along with it? It is said that the defendant has such a right, but it is to be restricted to the rebuttal of the guilty knowledge of the agent alone, and that however innocent in fact the principal may be, he is precluded from showing it. Thus we have, as a result, the naked proposition that there can be such an anomaly as what may be termed an irrebuttable constructive *scienter*, when the plain language of the statute requires that the dealer shall not be convicted if he shows that he is without guilty knowledge. It may be observed that the incongruity of the position is further illustrated by the fact that the record discloses that both of the clerks, who were indicted and tried with the defendant, were acquitted; and thus we have the case of a principal being convicted for the act of an agent who himself has been declared innocent. Now, it may be that a person can be convicted who commands two others to commit an offense, and the proof shows that it must necessarily have been committed by one of them, although both must be acquitted because of the inability of the jury to find which of the two committed the crime; but where the principal is absent, and the offense is committed contrary to his wishes and commands, and his guilt is asserted solely on the ground of agency, it would seem to present, at least, a novel groundwork upon which to build a case of constructive crime, it being impossible for the defendant to ascertain upon which agent the *prima facie* case, which he is required to rebut, has been imposed. The genius of free and constitutional government is opposed to constructive crime, and while I do not say it may not be warranted in cases of this character, where, in the interest of good morals, a great evil should be suppressed, I cannot sanction such a doctrine, when, as in this instance, the legislature has not only failed to authorize, but, in my opinion, has expressly forbidden it. Ingenuity may be able to construct a plausible argument in support of the conviction, but I think it must be attended with difficulty, and especially must this be so when the rule which requires all penal statutes to be construed strictly has always been considered in this state to be something more than a mere idle expression. The rule is founded upon the great principles of the criminal law, and must be followed in this as well

as in other cases. I can see no reason why the principle of the conviction in this case may not, as I have indicated, be extended to offenses of a more serious character, and it is chiefly because of this possible evil that I have felt it my duty to state the grounds of my dissent at such length."

Judge Shepherd was also of opinion that the defendant was entitled to a new trial, on the ground that the jury were erroneously instructed that if it were believed that the prosecuting witness bought liquor of one of the clerks, the defendant, their master, was guilty. No *prima facie* case existed against any one until the fact of the minority of the prosecuting witness, as well as the fact that he was unmarried, was found, as these are essential elements of the crime under the statute. In the absence of proof or admission of these facts, the court had no right to assume their existence, and instruct the jury on that hypothesis.

The case of *Snider v. State*, 81 Ga. 753, maintaining the doctrine adopted by the majority of the court in the principal case, is re-reported in 12 Am. St. Rep. 350, with a note appended thereto at pages 353, 354, citing the late cases on this subject. The case of *Commonwealth v. Stevens*, 153 Mass. 421, maintaining the contrary rule cited in the dissenting opinion, *supra*, is re-reported in 25 Am. St. Rep. 647; and see the note thereto, 651.

## STATE v. TENANT.

[110 NORTH CAROLINA, 609.]

**MUNICIPAL CORPORATIONS — POWER WHICH MAY BE DELEGATED TO.** — The legislature may, by direct enactment, restrict an individual in the exercise of such dominion and control over his own house or premises as may result in injury to others, provided the prohibitory or restraining statute does not, upon its face, discriminate in favor of one person or class of persons over others; and the legislature may delegate such power to municipal corporations.

**MUNICIPAL CORPORATIONS — ORDINANCE — DISCRIMINATION.** — A municipal ordinance which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, is unconstitutional and void, as failing to furnish a uniform rule of action, and as leaving the right of property subject to the despotic will of the city council, who may exercise it so as to give exclusive profits or privileges to particular persons.

**MUNICIPAL CORPORATIONS — ORDINANCES — DISCRIMINATIONS.** — A municipal ordinance providing that no person shall erect any house or building within the city, or add to, improve, or change any building therein, without having first obtained permission from the city council, is unconstitutional and void, as it does not furnish a uniform rule of action for the exercise of discretion in granting permits, and leaves the rights of property subject to the arbitrary discretion of the city council. A subsequent ordinance, containing the same provisions, providing penalties, and adopted to enforce the first ordinance, is void upon the same grounds.

INDICTMENT for the violation of a city ordinance. Verdict of guilty, and judgment thereon, from which defendant appealed.

*Theodore F. Davidson, attorney-general, and T. H. Cobb, for the state.*

*W. W. Jones and F. A. Sondley, for the defendant.*

AVERY, J. The legislature is empowered under the organic law to restrict an individual by direct enactment in the exercise of such dominion and control over his own house or premises as may result in injury to others, provided the prohibitory or restraining statute does not upon its face discriminate in favor of one person or class of persons over others. And though the law-making power can unquestionably create a municipal corporation and delegate legislative authority to it, it cannot clothe the creature with power to do what the constitution prohibits the creator from doing: *Cooley on Constitutional Limitations*, 4th ed., 198; *Weith v. Wilmington*, 68 N. C. 24. Police power may be exercised by the sovereign state through the general assembly, in derogation of the absolute right of the individual, only for the general benefit, and by means of statutory provisions that upon their face operate indiscriminately upon, and are enforceable by the same species of process against, all persons and classes: *State v. Moore*, 104 N. C. 721; 17 Am. St. Rep. 696; *State v. Chambers*, 93 N. C. 600; *State v. Stovall*, 103 N. C. 416; *Dent v. West Virginia*, 129 U. S. 114; *Mugler v. Kansas*, 123 U. S. 623. "Towns and cities cannot use their power to create monopolies for the benefit of private individuals, nor can they pass by-laws imposing penalties that do not operate equally upon all citizens of the state who may come or live within the corporate limits": *State v. Pendergrass*, 106 N. C. 664; *State v. Summerfield*, 107 N. C. 898; 1 Dillon on Municipal Corporations, sec. 380 (313).

It is equally clear that if an ordinance is passed by a municipal corporation, which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, it is unconstitutional and void, because it fails to furnish a uniform rule of action, and leaves the right of property subject to the despotic will of aldermen who may exercise it so as to give exclusive profits or privileges to par-

ticular persons: *Newton v. Belger*, 143 Mass. 598; *City of Richmond v. Dudley*, 129 Ind. 112; *ante*, p. 180; *Yick Wo v. Hopkins*, 118 U. S. 356; *May v. People*, Col., Oct. 26, 1891; 27 Pac. Rep. 1010; *Mayor etc. v. Rodecke*, 49 Md. 217; 33 Am. Rep. 239; *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175; *In re Frazee*, 63 Mich. 396; 6 Am. St. Rep. 310; *Tugman v. Chicago*, 78 Ill. 405; *Village of Braceville v. Doherty*, 30 Ill. App. 645; *Barthet v. City of New Orleans*, 24 Fed. Rep. 564; *Bills v. City of Goshen*, 117 Ind. 221; *Lake View v. Leitz*, 44 Ill. 81; *Horr and Bemis on Municipal Police Ordinances*, sec. 13; *Evansville v. Martin*, 41 Ind. 145.

The first ordinance relied upon to support the indictment provides: "That no person, firm, or corporation shall build or erect within the limits of the city of Asheville . . . any building of any kind or character, or otherwise add to, build upon, or generally improve or change any building, without having first applied to the aldermen and obtained a permission for such purpose." Whether the land-owner proposes to erect on his premises a storehouse, opera-house, dwelling, stable, kitchen, hen-house, and whether he proposes to use fire-proof or combustible material in the structure, he is required to apply to the aldermen of Asheville for a permit; and if the ordinance is valid, he incurs liability for violation of it the moment he begins the work of building. Moreover, if he should add a porch, a tower, or improve by digging a cellar the dwelling-house occupied by him, he would subject himself to like danger, though he should use no material in making the improvement not generally considered fire-proof. But while the right to prohibit the erection of a building without regard to the material to be used in constructing it has been held unreasonable, the most objectionable feature of the ordinance is the reservation by the aldermen of the right to refuse the application of one land-owner and grant that of another, arbitrarily and despotically, when, for all material purposes, the two apply for precisely the same privilege.

We concede that the constitutionality of an ordinance prohibiting the erection of wooden buildings, or buildings with wooden or shingle roofs, in the thickly settled portions of towns, and requiring a license before beginning to build such structures, has been usually, if not universally, sustained where the ordinance laid down a general rule that precluded the possibility of discrimination and favoritism in granting the license so as to limit the privilege to certain persons:

*Cordes v. Miller*, 39 Mich. 581; 33 Am. Rep. 330; *Tiedeman on Police Power*, 439, 440. We admit, also, that there are authorities which maintain the doctrine that even where contracts have been made with builders for the erection of such wooden buildings, before the passage of a valid ordinance, the builder is considered as having entered into a contract, subject to the right of the municipality to enact a prohibitory by-law and annul his contract at any time before he begins to build and expend money, that he may lose, if prohibited from finishing: *Knoxville v. Bird*, 12 Lea, 121; 47 Am. Rep. 326.

In *Yick Wo v. Hopkins*, 118 U. S. 356, the court held that it was a violation of the Fourteenth Amendment (in withholding the equal protection of the law) to pass and enforce ordinances in the city of San Francisco, which forbade persons to erect scaffolds on roofs, or carry on laundries in that city, without license or the consent of the supervisors, because it conferred upon the municipal authorities arbitrary power, at their will and without regard to the competency of the person applying, or the propriety of the place selected for carrying on the business. No matter, therefore, if the circumstances of a particular case were such that an applicant seemed about to create a nuisance, he could not be punished under a void ordinance, or one which prescribed no rule for the exercise of discretion on the part of city aldermen in restricting persons in the enjoyment of their rights of property or person: *State v. Webber*, 107 N. C. 962; 22 Am. St. Rep. 920; *State v. Hunter*, 106 N. C. 796.

In the case of *Newton v. Belger*, 143 Mass. 598, not only is the same principle enunciated, but the ordinance is almost identical with that under consideration in the case at bar. The prohibiting portion was as follows: "No person shall erect, alter, rebuild, or essentially change any building, or any part thereof, for any purpose other than a dwelling-house, without first obtaining, in writing, a permit from the board of aldermen." The court said: "It does not merely forbid the erection of any building which is hazardous, and which exposes other persons or property to danger; . . . on the contrary, it gives them the power, by refusing a permit, to prevent the erection of any building, except a dwelling-house, for any reason which may be satisfactory to them. Under the ordinances they may refuse a permit because, in their opinion, it is desirable that certain parts of the city shall be used for handsome dwelling-houses, and that all buildings for the pur-

pose of trade shall be excluded, though in no sense dangerous." What is there in the ordinance under consideration to prevent the aldermen, if they were so inclined, from prohibiting the construction of any houses, in a defined boundary, except costly dwellings, and thereby enhancing the value of the property in which they have a personal interest? We have no idea that any such purpose exists, but we cannot sanction the enforcement of an ordinance by means of which the aldermen may at any time not only entertain but act upon such an improper motive.

Upon the principle which we have announced, an ordinance fixing the amount of city tax on theaters, roller-skating rinks, etc., at such sum of money as the council should determine in each particular case, was held void, because it gave power to discriminate "between persons engaged in like business": *Bills v. City of Goshen*, 117 Ind. 221. An ordinance aimed at the Salvation Army, which forbade any persons or society to parade a street singing or beating drums, etc., without having first obtained the consent, in writing, of the mayor, or in his absence of the president of the city council, was declared void upon the same ground: *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175.

In *Horr and Bemis on Municipal Police Ordinances*, sec. 263, the rule as to the proper form of ordinances in reference to granting license is laid down as follows: "As has already been stated, no discretionary powers should be vested in officers whose duty it is to execute the provisions of ordinances, and the rule is applicable to this class of ordinances. The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses to all who comply with the prescribed conditions." In *State v. Hunter*, 106 N. C. 796, this court held an ordinance unconstitutional because it clothed a policeman with an arbitrary discretion to determine what was a reasonable time to wait for persons to move off the sidewalk before making an arrest.

The case of *State v. Yopp*, 97 N. C. 477, 2 Am. St. Rep. 305, stands upon a very different principle. While the legislature has no right to enact a law forbidding all men in a certain section from building houses of any kind on their own land, it unquestionably is empowered to forbid riding bicycles on a particular road or street altogether, because the lives of other persons and the safety of the property of others are im-

periled by their use, on account of the danger of frightening horses attached to vehicles. *Sic utere tuo ut non alienum laedas*. Having power to prohibit using bicycles on the road entirely, the legislature had the same power to authorize a person or tribunal to grant a license, when the road should be clear of vehicles, that it has to provide for licensing the sale of spirituous liquors.

"Where the nuisance consists, not in the building itself, but in the use to which it is put, the building cannot be destroyed": Tiedeman on Police Power, 441. "If a house is used for the purpose of a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such trade or business": Tiedeman on Police Power, 441. The same principle must necessarily apply to construction as to destruction of buildings on account of health. So that if the ordinance, instead of being void for want of a rule governing the exercise of discretion by aldermen, had provided in plain terms that no person or corporation should be allowed to erect a building without a license at any point within the city, if it were understood that the person or corporation proposed to use the house for a hospital for the infirm or sick, and that the same individual or corporation had admitted a patient suffering from typhoid fever into a hospital under their management on another portion of the same lot, the ordinance would have allowed an unreasonable interference with the rights of land-owners, because it is not necessary, in order to protect health, to prohibit a person from building a house according to any plan on his own land, but the end may be reached by prohibiting the reception of patients who are suffering from infectious or contagious diseases. The act incorporating the Asheville Mission Hospital, with which the defendant contracted to build, empowered the corporation to erect one or more hospitals "for unfortunate and destitute persons," and invested it with authority to make by-laws, etc.: Private Laws of 1891, c. 306, secs. 3, 4. So that the officers might, while the building was in the course of erection, have enacted a by-law providing that only aged and infirm persons who were destitute should be admitted. Instead of using their authority to prevent the spread of disease, the ordinance leaves it in the power of unprincipled officers to locate hospitals entirely with a view to enhancing the value of certain property.

The erection of the hospital in a section where there were only tenement houses might enhance values of property in the vicinity, while if located in a more fashionable quarter it might be considered an eyesore.

It seems, however, that the corporation in the case at bar have already a building on the same lot, which had been used as a hospital, and had asked a permit to add another, and thereby furnish additional accommodation for the sick, and had passed a by-law forbidding the reception of patients suffering from contagious or infectious diseases, except by special arrangement with the managers, under the advice of the physician. But cases of typhoid fever had been admitted to that hospital. We do not know, judicially, whether that disease is infectious or not; but if the city, instead of the Mission Hospital, will enact just such a prohibitory by-law applicable to all hospitals within the corporate limits, that question can be determined in the appointed way: *Arkadelphia v. Clark*, 52 Ark. 23; 20 Am. St. Rep. 154. After the license to build was refused, the work of building was commenced and prosecuted for some time under a contract previously made by the defendant with the Mission Hospital. Subsequently (August 28, 1891), the ordinance providing that a further prosecution of such work, after notice, should subject all mechanics, contractors, etc., to a penalty, was passed, and the warrant, which charges specifically a violation of the said ordinance of August 28, 1891, was issued on October 5, 1891. If it be conceded that the first ordinance was void because it prescribed no general rule for the exercise of discretion in granting permits, the ordinance passed after the contractor had expended money in disregard of the void by-law, and providing simply that all persons engaged in erecting such building should be subject to a penalty for failure of the owner of the property to get a permit under the old arbitrary law, would be subject to the same objection, if not to others equally as fatal to its enforcement against the defendant.

There was error in the ruling of the court that the defendant was guilty, and a new trial must be granted.

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**MUNICIPAL CORPORATIONS—ORDINANCES.**—A municipal ordinance placing restriction upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit to the exercise of the privilege all citi-



sens alike who will comply with such rules and conditions, and must not admit of the exercise, or of the opportunity for the exercise, of any arbitrary discrimination by municipal authorities between citizens who will so comply: *Richmond v. Dudley*, 129 Ind. 112; *ante*, p. 180, and note.

**MUNICIPAL CORPORATIONS—POLICE POWER.**—Police regulations must have reference to comfort, safety, and welfare of society. Rights of property cannot be invaded under the guise of police power, nor can the legislature constitutionally declare a thing to be a common nuisance which is not such in fact: *First Nat. Bank v. Barile*, 129 Ind. 201; *ante*, p. 185, and note.

CASES  
IN THE  
SUPREME COURT  
OF  
OREGON.

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**HAHN v. BAKER LODGE No. 47.**

[21 OREGON, 30.]

**DEEDS—GRANT OF PART OF BUILDING AFTERWARDS DESTROYED.**—A grant of a specified room in a particular building, with a right of ingress and egress, must be construed according to the intention of the parties and with reference to the subject-matter; and when it clearly appears from the grant that it was not intended for any interest in the land to pass further than is necessary for the enjoyment of the room granted, the destruction of the building by fire or otherwise terminates all rights of the grantee in the premises.

**DEEDS—GRANT OF PART OF BUILDING—EFFECT OF DESTRUCTION OF WHOLE.**—Where a grant conveys a certain specified room in a particular part of a designated building, without purporting to convey any other interest in the land or building, except the right of ingress and egress, and contains no stipulation as to the right to rebuild in the event of the destruction of the building by fire or otherwise, the destruction extinguishes the identity and existence of the room granted and the rights of the grantee in the premises.

**EASEMENTS—EXTINGUISHMENT.**—When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted, the easement is extinguished.

*Hyde, Johns, and Olmsted, and T. C. Hyde, for the appellant.*

*Williams and Wood, for the respondent.*

**LORD, J.** This is a suit in equity, brought by the plaintiff to restrain the defendant from interfering with certain alleged rights in certain premises claimed by the plaintiff.

The facts out of which the question presented for our consideration arose are substantially these: The plaintiff was the owner of a certain lot in Baker City, upon which was erected a two-story building, the middle room or hall in the upper story

of which was owned by the defendant, and used as a lodge hall, and as appurtenant thereto owned an easement as a means of ingress and egress. The room owned by the defendant, being a middle room, had front and rear walls and two lateral walls. A fire occurring, the whole building was substantially destroyed; the roof, floors, joists, windows, and doors were totally consumed by the flames, and at the same time the rear and front walls were entirely destroyed to their foundation, and only a portion of the lateral walls remained, which were fire-cracked, shaky, and unfit for use. So far as relates to the second story, only a portion of the lateral walls were left above the second story, and as they stood, they were unsafe and practically useless for rebuilding purposes. The other walls were destroyed, so that the middle room in the second story, used as a hall by the defendant, and its foundations, were practically destroyed by the conflagration, and its identity lost or extinguished. While there is some conflict in the evidence, there is none upon which to base the contention that there was any sufficient portion of the lateral walls remaining to preserve the identity of the middle room, or that such portions as remained were sufficiently safe for rebuilding purposes as they stood.

The practical deduction from the evidence, considered as a whole, leaves no doubt that the middle room in the upper story owned by the defendant was wholly destroyed, and that the building itself was substantially destroyed. Upon this state of facts, the inquiry is, Had the defendant the right, which it undertook to exercise, and which this suit is brought to enjoin, of rebuilding the walls for the purpose of reconstructing an upper story and re-creating a middle room to be used as a lodge hall in the place of the one destroyed by the fire? By its conveyance, the defendant had granted to it what was known and styled as the middle room of the upper story of the building, and an easement of ingress and egress. There is no provision in it, or right given to the defendant in case of the destruction of the upper story by fire, or of the building itself, to rebuild it. It does not in terms grant or convey the land, and does not purport to grant or convey the building, but only the middle room or hall in the upper story, and without any stipulation as to rebuilding in case of fire.

It seems to us that conveyances of this kind, like leases of apartments in buildings, must be construed according to the intention of the parties, and with reference to the subject-

matter upon which they operate. As applied to a lease, the doctrine of the law is, when it is not the intention to grant any interest in the land further than is necessary for the enjoyment of the room leased, that when such room is destroyed there is nothing upon which the demise can operate, and that the lease terminates with the destruction of the thing leased: *Harrington v. Watson*, 11 Or. 143; 50 Am. Rep. 465. The application of this doctrine is well illustrated in the case of *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220, in which this question was carefully considered. In that case the lessor of a three-story building leased the cellar or basement to a tenant for five years, and the other stories to other tenants, but the lease contained no stipulation as to rebuilding in case of fire, and it was held that the destruction of the building terminated the lessee's rights in the premises. It was put upon the ground that such leases of distinct rooms or apartments do not carry any interest in the land beyond that connected with the enjoyment of the particular room; that the room was the thing leased, and that the destruction of the thing leased necessarily terminated the lessee's interest therein. The real question in all such cases, as it must be in the case at bar, is, whether the intention of the parties, collected from the whole instrument, was to grant any estate in the land. The language of this conveyance precludes the idea that it was the intention to grant the building, or any portion of it, but only a certain room located in that building, — "the middle room or hall of the upper story," — which is the principal thing granted, and which is identified by description to distinguish it from other rooms.

As the conveyance does not purport in terms to grant any estate or interest in the land, and as the provisions of the conveyance carefully distinguish the room granted from other rooms or the building, and as it contains no stipulation to rebuild in case of fire or other casualty, there is nothing to be taken by implication to justify us in holding that any grant of an estate in the land was intended. It is not doubted that there may be a freehold interest in a part of a building: 1 Washburn on Real Property, 18. Nor do we wish to be understood as holding that the sale of an interest in a building may not be a sale of an estate or interest in the subjacent soil. What we are trying to indicate is, that by the terms of the instrument, it is the middle room or hall of the upper story which was granted to the defendant, and not a part of the building;

that the defendant did not acquire any right of ownership in the building, or any part of it, but in the room or space inclosed by that part of the building which was described and identified as the middle room or hall of the upper story. This it owned, and so long as it existed, and its identity was preserved, the defendant had the right to its enjoyment. But when the fire destroyed the building, and the identity of the room and its existence as such were extinguished and at an end, there was nothing remaining upon which the defendant's conveyance could operate, and its rights at once terminated.

In *Thorn v. Wilson*, 110 Ind. 325, 59 Am. Rep. 209, where a committee on behalf of the order of Freemasons had been granted the right to construct a second story upon a building erected by the owner of the land, "to have and own said second story for their use perpetually," it was held that they did not acquire any proprietary interest in the freehold of which such second story became a part. In construing the instrument the court says: "It is evident that the instrument relied on by the appellant does not convey an interest in the land"; and then adds, "for it is quite clear that if the buildings should be totally destroyed, the rights of the appellants, and of their grantors as well, would at once terminate." As the instrument grants the defendant no estate in the land, and contains no stipulation of a right to rebuild in case of destruction by fire or other casualty, it would seem to be plain that it was the intention of the parties, collected from their agreement and its subject-matter, that the agreement and the relation created by it should terminate with the destruction of the building.

The remaining question is, whether the easement for the purpose of ingress and egress was extinguished by the destruction of the building. The facts show that such easement was granted for the particular purpose of affording ingress and egress to the building. Without it, the principal thing (the room granted) would be practically useless. It was essential and necessary for the enjoyment of the room, and was granted on account of it. Nor is it of any use, within the purposes of the grant, without the existence of the room. In such case, the general rule, as stated by Mr. Washburn, is, that "if an easement for a particular purpose is granted, when that purpose no longer exists there is an end of the easement": Washburn on Easements, 654, 657. When the reason and necessity for the easement ceased, within the intent for which

it was granted, as it did when the building was destroyed by fire, it would logically result there was an end of the easement.

For these reasons, we think there was no error upon the legal questions presented by this record, but that the damages awarded are not justified by the facts under the circumstances, and that the decree awarding them must be disallowed, but in all other things affirmed, and so it is ordered.

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**LANDLORD AND TENANT — EFFECT OF DESTRUCTION OF PREMISES.** — The relation of landlord and tenant is terminated by the destruction by fire of the leased premises: *McMillan v. Solomon*, 42 Ala. 356; 94 Am. Dec. 654, and extended note; note to *Smith v. Kerr*, 2 Am. St. Rep. 368.

**EASEMENTS — EXTINGUISHMENT.** — Ways of necessity exist only so long as the necessity for the easement continues: Note to *Pettingill v. Porter*, 85 Am. Dec. 677. If a parol license is to do something upon the land of the licensee which prevents the further enjoyment by the licensor of an easement in the land, such a license when executed is irrevocable, and extinguishes the easement: *Boston etc. Ry Co. v. Doherty*, 154 Mass. 314.

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## SIMMONS v. WINTERS.

[21 OREGON, 35.]

**A WATERCOURSE** is a stream of water, usually flowing in a particular direction, with well-defined banks and channels, but the water need not flow continuously, as the channel may sometimes be dry. The term "watercourse" does not include water descending from hills, down hollows and ravines, without any definite channel, only in times of rain and melting snow.

**WATERCOURSE, WHAT CONSTITUTES.** — Where water, owing to the hilly and mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the land below, and in its onward flow carves out a distinct and well-defined channel, which, even to the casual glance, bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, — such stream constitutes a watercourse, and is governed by the rules applicable thereto.

**WATERCOURSES — APPROPRIATION OF WATER BY NATURAL CHANNELS.** — There must be an actual diversion of water from its natural channel, by means of a ditch or other structure, to effect a valid appropriation thereof; but any dry ravine, gulch, hollow in the land, or the lower portion of the same, bed or natural channel from which the water is taken, may be used for this purpose as a part of the ditch for conducting the water.

**WATERCOURSES — APPROPRIATION — NECESSARY INCIDENTS OF.** — To constitute a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and the amount of

water appropriated must be restricted to the quantity needed for such purpose.

**WATERCOURSES — WATER AS APPURTENANT TO GRANT OF LAND.** — When the right to the use of a ditch and water exists in favor of land conveyed by deed, and without which the land would be practically valueless, and constitutes perhaps the only inducement for the purchase, it will pass by the deed, with or without the use of the word "appurtenances" therein.

**WATERCOURSES — APPROPRIATION OF WATER — RIGHT OF PRIOR APPROPRIATOR AS AGAINST LOWER OWNER.** — A prior appropriator of water from a stream cannot claim or hold any more water than is necessary for the purposes of his appropriation, and the surplus, if any, must be allowed to flow on for the benefit of the lower proprietors.

*T. H. Crawford*, for the appellant.

*R. Eakin*, for the respondent.

**LORD, J.** This is a suit in equity, brought by the plaintiff to enjoin the defendant from diverting the waters of a certain stream commonly known as Sheep Creek ditch, and for damages. The waters of Sheep Creek ditch flow through the lands of the plaintiff and the defendant. The theory upon which the suit is predicated is, that Sheep Creek ditch is an ancient and natural watercourse, with well-defined banks and channels, to the uninterrupted flow of which the plaintiff is entitled as a riparian owner, and by the diversion of which he has already been damaged, and will be irreparably damaged unless the defendant be restrained and enjoined. The facts alleged being denied, the defense set up was prior appropriation of the waters of Little Sheep Creek by means of a dam, ditches, and dry ravines, or draws, into what is commonly known as Sheep Creek ditch, for the purpose of irrigation, stock, and domestic uses.

The legal aspect of the case involves an inquiry into,—1. What constitutes a watercourse; 2. The quantity of water to which an appropriation is restricted; and 3. The nature of the water-right which may pass as appurtenant to the premises conveyed.

Considering these in their order, the inquiry is, What is included within the term "watercourse"? When there is a living stream of water, within well-defined banks and channel, no matter how limited may be its flow of water, there is no difficulty in determining its character as a watercourse. But when the stream is of that class which periodically or occasionally flows through ravines, gullies, hollows, or depressions in land, and by its flow assumes a definite channel, such as

indicates the action of running water, there is often some difficulty of distinction.

A watercourse is defined by Bigelow, J., as "a stream of water, usually flowing in a definite channel, having a bed, or sides, or banks, and usually discharging itself into some other stream or body of water": *Luther v. Winnisimmet Co.*, 9 Cush. 174. It is "a living stream, with defined banks and channels, not necessarily running all the time, but fed from other and more permanent sources than mere surface water": *Jeffers v. Jeffers*, 107 N. Y. 650. The size of the stream is immaterial, but "it must be a stream in fact as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be constant": *Pyle v. Richards*, 17 Neb. 182. It is defined in *Eulrich v. Richter*, 37 Wis. 226, to be "a stream of water usually flowing in a certain direction, in a regular channel, with bed and banks. But the water need not flow continually,—the channel may be sometimes dry." "There must, however, always be substantial indication of the existence of a stream which is ordinarily and most frequently a moving body of water": *Weis v. City of Madison*, 75 Ind. 253; 89 Am. Rep. 135.

"A watercourse," says Mr. Angell, "consists of bed, bank, and water; yet the water need not flow continually, and there are many watercourses which are sometimes dry. There is, however, a distinction to be taken in law between a regular flowing stream of water, which at certain seasons is dried up, and those occasional bursts of water which, in times of freshets or melting of ice or snow, descend from the hills and inundate the country": Angell on Watercourses, sec. 4. The distinction is, as Hawley, C. J., said, "that it is a flowing stream of water,—a watercourse as distinguished from water flowing through hollows, gulches, or ravines only in times of rain or melting snow": *Barnes v. Sabron*, 10 Nev. 237. "Such hollows or ravines," said Dixon, C. J., "are not in legal contemplation watercourses": *Hoyt v. City of Hudson*, 27 Wis. 656; 9 Am. Rep. 473. But "if the face of the country is such," said Williamson, chancellor, "as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial,



such channel is an ancient natural watercourse": *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395. "In a broken and bluffy region of country," said Mitchell, J., "intersected by long, deep gullies or ravines, surrounded by high, steep hills or bluffs, down which large quantities of water from rain or melting snow rush with the rapidity of a torrent, often attaining the volume of a small river, and usually following a well-defined channel, . . . such streams partake more of the nature of natural streams than of ordinary surface waters, and must, at least to a certain extent, be governed by the same rules": *McClure v. City of Red Wing*, 28 Minn. 186.

In *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241, it is held, where surface water from rains and snow in a hilly country seeks its outlet through a gorge or ravines, and by its flow assume a definite channel with well-defined banks, such as will present to the casual glance the unmistakable evidence of the frequent action of running water, and through which at regular seasons the water flows, and has done so immemorially, such stream is a natural watercourse. In *West v. Taylor*, 16 Or. 172, Strahan, J., said that "water which has accumulated from spring rains and melting snows, and which has flowed several miles between regular banks of a well-defined watercourse, . . . must be deemed a watercourse."

The conclusion to be deduced from these decisions is, that a watercourse is a stream of water usually flowing in a particular direction, with well-defined banks and channels, but that the water need not flow continuously,—the channel may sometimes be dry; that the term "watercourse" does not include water descending from the hills, down the hollows and ravines, without any definite channel, only in times of rain and melting snow; but that where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the lands below, and in its onward flow carves out a distinct and well-defined channel, which, even to the casual glance, bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial,—such a stream is to be considered a watercourse, and to be governed by the same rules.

In this state, the doctrine of the right to water by prior appropriation for mining or irrigating lands has not been adopted or applied, except as the parties have acquired their rights

under the act of Congress of 1866. Nor has there been any legislation by the state upon the subject. By the act of Congress, the right to water by prior appropriation from the streams upon the public domain was recognized and established. But the appropriation, said Mr. Justice Field, "is limited in every case in quantity and quality by the uses for which the appropriation is made": *Atchison v. Peterson*, 20 Wall. 514. The measure of the right of the first appropriation of the water, as to extent, follows the nature of the appropriation, or the uses for which it is taken: *Ortman v. Dixon*, 13 Cal. 38. The needs or the purpose for which the appropriation is made is the limit to the amount of water which may be taken. He can only appropriate so much as he needs for the given purpose. But the appropriation must be made for some beneficial purpose, presently existing or contemplated. Mr. Pomeroy says: "In order to make a valid appropriation of waters upon the public domain, and to obtain an exclusive right to the water thereby, the appropriation must be made with a *bona fide* present intention of applying the water to some immediate useful or beneficial purpose, or in present *bona fide* contemplation of a future application of it to such a purpose by the parties thus appropriating it": Pomeroy on Riparian Rights, sec. 47. There must be some actual beneficial purpose existing at the time, or contemplated in the future, as the object for which the water is utilized. If the amount of the water appropriated is within the given beneficial purpose for which it was taken,—no more than is necessary to irrigate the lands contemplated to be reduced to cultivation as soon as can be reasonably done,—although more than can be beneficially used for the present, it is nevertheless a valid appropriation.

While a settler cannot appropriate more water from the public domain than is necessary to irrigate his land, nor any to irrigate lands which he does not intend to cultivate nor own, or hold by possessory title, to the exclusion of subsequent *bona fide* appropriators, yet he is not required, in order to make his appropriation valid, to beneficially use the first years of his settlement the full amount of water appropriated, when such amount is no more than is necessary to irrigate the lands he intends to subject to cultivation. His original appropriation may be made with reference to the amount of water that is needed to irrigate the lands he designs to put into cultivation.

This view is ably sustained in *Barnes v. Sabron*, 10 Nev. 243,

by Hawley, C. J., who, after stating that the plaintiff's rights to the water are not dependent upon the amount beneficially used by him in the first year of his appropriation, proceeds to say: "He was only entitled to as much water, within his original appropriation, as was necessary to irrigate his land, and was bound under the law to make a reasonable use of it. . . . No person can, by virtue of a prior appropriation, claim or hold any more water than is necessary for the purpose of the appropriation. Reason is the life of the law; and it would be unreasonable and unjust for any person to appropriate all the waters of a creek when it was not necessary to use the same for the purposes of his appropriation. . . . What is a reasonable use depends upon the particular circumstances of each particular case. In this case, plaintiff should not be confined to the amount of water used by him in 1869 or 1870, nor his rights regulated by the number of acres he then cultivated. He did not cultivate more land, because 'his team was poor,' and he 'had no money to hire help.' The object had in view at the time of his diversion of the water must be considered in connection with the actual extent of his appropriation."

As there must be an actual diversion of the water from its natural channel by means of a ditch or other structure to effect the appropriation, any dry ravine, gulch, or hollow in lands may be used for this purpose as a part of the ditch for conducting the water. Not only may these be used by the appropriator as a part of his ditch, but he may use the lower portion of the same bed or natural channel from which the water is taken: *Pomeroy on Riparian Rights*, sec. 48. It is thus seen, that in order to make a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and that the amount of water appropriated must be restricted to the quantity needed for such purpose.

Where there is no express grant or sale of a ditch or water-right mentioned in the deed of the land, other than may be included in the use of the word "appurtenances," the question is, whether the interest of the grantor in such ditch and right to the use of the water would be conveyed or pass to the grantee by such deed. The maxim of the law is, that whoever grants a thing is supposed also tacitly to grant that without which the grant would be of no avail. Where the principal thing is granted, the incident shall pass: *Co. Litt.* 152. A grant of real estate will include whatever the grantor has power to convey, which is reasonably necessary to the enjoy-

ment of the thing granted: 3 Washburn on Real Property, sec. 627. By the grant of a mill, or the grant of land with the mill thereon, the waters, flood-gates, and the like, which are of necessary use to the mill, pass as incident to the principal thing granted: Shep. Touch. 989. "Nor," says one writer of note, "is the word 'appurtenances' necessary to the conveyance of the water-right in such cases, because the incident goes with the principal thing, and this principle is specially applicable to water privileges in grants": Angell on Watercourses, sec. 153 a. Where the right to the use of a ditch and water exists in favor of land conveyed by deed, and without which the land would be valueless, and constituted perhaps the only inducement for the purchase, they will pass by the deed without the use of the word "appurtenances."

The case of *Cave v. Crafts*, 53 Cal. 135, is in point here. There, the question involved the use of water for the purpose of irrigation as appurtenant to the lands acquired, and the court says: "The word 'appurtenances' is not necessary to the conveyance of the easement. The general rule of law is, that when a party grants a thing, he, by implication, grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing. The idea and definition of an easement to real estate granted is, a privilege off and beyond the local boundaries of the lands conveyed." In *Tucker v. Jones*, 8 Mont. 225, the plaintiff Tucker only acquired whatever possessory rights and the improvements thereon his grantees, Pierce and Durham, had to the lands. As the deed conveying the lands contained no express grant or sale of the ditch or water-right, except as it was included in the use of the word "appurtenances," the question was, whether the interest of Pierce and Durham in the ditch and the right to the use of the waters of Rattlesnake Creek were conveyed in the deeds to the lands from those persons to the plaintiff Tucker. The court says: "When Pierce and Durham conveyed their possession of the land with its appurtenances, they also conveyed their interest in the ditch and water-right, which was necessary to the cultivation, use, and enjoyment of the land, just as certainly and as fully as if they had described it in express terms in the deed itself."

As this phase of the case may be easily disposed of upon the undisputed facts, it will be sufficient to say that the evidence shows that Clark Rowland and Joseph Cox were homestead settlers upon the public domain, to whom in due course

of time were issued patents by the government to the lands upon which they had respectively settled in 1877; that the defendant, W. H. Winters, derives his title to the lands now owned and occupied by him, the same being the lands settled upon by the said Rowland and Cox, by deeds of conveyance from them with the usual covenants and warranty; that before and at the time of such sale and conveyance, there were important water rights connected with such lands, and used for the purpose of their irrigation, and without which such lands were of little value; and that at the time of the appropriation of the water for uses specified by them and the defendant, all the lands over and across which it was conveyed were unoccupied public lands of the government.

Upon this state of facts, it is clear, then, that when Rowland and Cox conveyed by their deeds the lands respectively settled upon by them, with their appurtenances, they also conveyed their interests respectively in the ditch and water right, which was connected therewith, and necessary to the cultivation and enjoyment of such lands, as much so and as certainly as if they had so declared by express terms in their deeds. In such case, within the principle already announced, a grantor conveys by his deed as an appurtenance whatever he has the power to grant which is practically annexed to the land at the time of the grant, and is necessary to its enjoyment, in the condition of the estate at that time. But the theory upon which the plaintiff has brought his suit for an injunction, and what he is seeking to establish by his evidence, is, that Sheep Creek ditch is an ancient watercourse flowing through his land in two well-defined channels; that it has so continued to flow from time immemorial without interruption or abatement until the spring of 1888, when the defendant diverted and appropriated all of its waters, and that as a riparian owner he has a right to have its waters continue to flow in its channels through his land without interruption or diminution. His own and other testimony of those similarly situated shows in substance that he purchased the land he now occupies, and through which Sheep Creek ditch runs, from the state of Oregon in 1880, and at that time its waters were flowing through his land in well-defined channels, and so continued to flow in about the same amount from year to year, varying some with the season, but at no time less than one thousand inches, until the spring or summer of 1888, when its diversion and appropriation by the defendant, together with an exceptionally dry

season affecting its supply, caused its channels to become partially or almost wholly dry; so much so at least as to deprive him of water for irrigating his land, stock, and domestic purposes, greatly to his damage, which is variously estimated, but by no witness testifying in his behalf at less than five hundred dollars. His testimony designed to prove that Sheep Creek ditch is an ancient watercourse, and that the waters flowing in its channels are its natural waters as distinguished from waters diverted from Little Sheep Creek and turned into Sheep Creek ditch, is derived principally from the opinion of witnesses based on the appearance Sheep Creek ditch presented about the time of his purchase of his land, and subsequent thereto, with some little exception, not of much value for want of particularity and attention at the time to the subject-matter now of inquiry. These witnesses, judging from the appearance Sheep Creek ditch then presented, express the opinion that it is a natural watercourse, and that the waters flowing in its channels are its natural waters, with perhaps some little diminution.

At the same time, some of these witnesses testify that the willows and cottonwood growing along its course were very small eight years ago, and that the soil was materially different from that on Prairie Creek, not far distant, and which is conceded to be a watercourse, one of them saying that he did not know of any other creek in the whole Wallowa Valley that had sod like Sheep Creek ditch, indicating by the recent growth of the willows, and the nature of the soil through which Sheep Creek ditch has cut its channels, that it is not an ancient watercourse whose waters have been accustomed to flow therein regularly or continuously from time immemorial. The plaintiff and some of his witnesses admit that they knew and understood at the time of his purchase and settlement as well as their own that the grantors of the defendant and others above him on Sheep Creek ditch claimed to have diverted the waters of Little Sheep Creek by means of a dam, ditches, gulches, and ravines, or dry draws, into what is now known as Sheep Creek ditch, and to be entitled to the use of its waters by prior appropriation. To better understand the case, we must now turn to the evidence for the defendant, which shows that the grantors of the defendant and three other persons in 1877 settled respectively upon certain lands belonging to the government, which being dry and arid and unproductive without irrigation, for the purpose of securing a

supply of water for stock and domestic purposes and the cultivation of their lands went up to a natural watercourse called Little Sheep Creek, built a dam across it, and by digging ditches and using gullies, ravines, or dry draws, as called by various witnesses, they diverted substantially all the waters of that stream, roughly estimated to be about twenty-five hundred inches, which they divided into equal parts among themselves, and caused these waters to flow therein, using as much as they each needed, and letting the surplus flow on, and thereby created the stream now known as Sheep Creek ditch.

His evidence also goes to show that these ravines, depressions, or dry draws, as called, which they used to convey the waters to their lands, were dry draws, and in which no natural waters were accustomed to flow, but that they were caused by occasional bodies of surface water descending from the hills during times of melting snow and ice; that there is quite a number of such draws between Sheep Creek ditch and Prairie Creek, only a mile or two apart, and that they are very similar to such as were used for Sheep Creek ditch, and that owing to the face of the country, it is not possible for Little Sheep Creek to have flowed through Sheep Creek ditch. It also tends to show that no willows or shrubbery ever grew along its course until the diversion of the waters had been effected, and that the sod and soil through which it flowed was not such as belonged to or was found along natural watercourses, but that the effect of the diversion was to make Sheep Creek a living stream, cutting out, by the force of its waters through sod and soil, except occasional spreads here and there, a definite channel, and discharging its waters into Prairie Creek. There were also several other dry draws or ravines between Sheep Creek ditch and Prairie Creek, which were only a short distance apart; but these, like those of which Sheep Creek ditch had been partly constructed, were without water or shrubbery, or other characteristics of a natural watercourse, or of the action of water, other than was produced by the mere drainage of surface water from melting snows, showing that the ravines and draws with which Sheep Creek ditch is partly made were dry and without water, as was testified to by several witnesses, and that it only assumed that character when by dam and ditches connecting with dry draws or ravines the waters of Little Sheep Creek were diverted into them.

The testimony establishing these facts is supported by several witnesses, whose opportunities were such, both before and

after the diversion had been effected, and the way and means by which it was accomplished, as to give great value to their testimony, especially in the absence of any contradiction or attempt at impeachment. It was after the waters had been turned into Sheep Creek ditch, and it had begun to assume the appearance of a natural stream in running through the ravines or draws, that the principal witnesses for the plaintiff express the opinion that it was a natural and ancient watercourse; but much of their testimony in regard to the size of the willows and the character of the sod and soil through which it had cut a well-defined channel to Prairie Creek is but a corroboration of the testimony for the defendant and hardly consistent with the theory of an ancient watercourse. It was because these parties, including the grantors of the defendant, who had constructed Sheep Creek ditch, and turned the waters of Little Sheep Creek into it, did not have any immediate use for the full amount of water diverted for the cultivation of their lands that, after using such amount of it as they needed, they permitted the surplus to flow and to create through the lands lying below a living stream, along which other persons, in course of time, settled and used the water for irrigating their lands, stock, and domestic purposes.

Mr. Rowland, one of the grantors of the defendant, after stating by whom, how, and by what means the diversion was effected, says: "The owners (five) used all they each needed, and let the surplus flow on through the ditch, to be taken up by the settlers below as they needed it. This was our custom." While Mr. Rowland does not state exactly the full amount of water which was diverted, although one of the original parties, yet it is estimated at two thousand five hundred inches, of which each party was to have five hundred inches, and according to which the defendant claims he was entitled to one thousand inches by his conveyances. As the amount of water needed for irrigation in the first years of the settlement was necessarily small, a large surplus, estimated variously, and varying from one to two thousand inches, was permitted to flow, and create the watercourse upon which the plaintiff subsequently settled.

Recognizing the force of this evidence as fatal to the contention that Sheep Creek ditch is a natural and ancient watercourse, and to secure the right to the use of its waters to the extent already appropriated by him, the plaintiff, conceding that it is not a natural and ancient watercourse, claims that as the defendant and others have not appropriated for the irri-



gation of their lands the amount of water diverted, but permitted the surplus for several years over the amount needed for their domestic and agricultural purposes to flow on and become a watercourse, they have thereby fixed the amount of water necessary for their lands (which is admitted to be one hundred and ten inches appropriated by the grantors of the defendant to which he is entitled by his conveyances), and that the plaintiff and others living below are entitled to appropriate its surplus accustomed to flow through their lands.

The law, as already stated, is, that no one can, by a prior appropriation, claim or hold any more water than is necessary for the purposes of his appropriation. The grantors of the defendant, however much they may have diverted, could not have lawfully appropriated any more water than was necessary to irrigate their lands and for stock and domestic purposes. That much they were entitled to use when needed or necessary for the purposes specified, and to that extent it was a valid appropriation of the waters to a beneficial use upon the lands, and that much, as an appurtenance, the defendant acquired by his conveyances from them and was entitled to use. Beyond the amount of water thereby taken, his rights did not go; he could not waste it, and was only entitled to as much water within his original appropriation as was necessary to irrigate his lands. As the grantors of the defendant and their associates, according to the evidence, had diverted more water into Sheep Creek ditch than they needed, and therefore more than they intended to use or appropriate for irrigation, stock, and domestic purposes, they permitted the surplus to flow through the ditch upon the lands of the defendant and others, to be taken up and used by them. How much there was of such surplus it is difficult to determine, but it amounted to one thousand inches, and at times much more, owing to its use and the season.

The court below found that the amount of water used and appropriated by the defendant and his grantors did not exceed three hundred inches, varying from fifty inches to that amount, as needed for the purposes of the appropriation; but in our judgment, four hundred inches would be nearer the amount intended to be appropriated for the uses specified; and as between the parties to this record, but no others, this should be taken as the amount of water that the defendant is entitled to use, leaving the surplus to flow on according to the custom

established by his grantors to be appropriated by the settlers below.

It is now claimed that the facts show that the defendant used or wasted this surplus upon his lands, to the damage and detriment of the rights of the plaintiff acquired in its flow through his land. The evidence indicates, without dissent, that the season was exceptionally dry, and that the snow in the mountains was scant, seriously affecting the source of Little Sheep Creek's supply of water, and by reason thereof less water flowed down the ditch; that those above the defendant used the waters freely, as much as was necessary for the irrigation of their lands within the purposes of their original appropriation, and that these causes combined to use the water in the ditch, leaving little or no surplus to flow on, causing the settlers below to complain, and a litigation to be threatened, which, to avoid, they used less water and permitted more to pass through the ditch, except the defendant, who continued to use the amount he claimed that was necessary for the irrigation of his lands, and to which he was entitled within the original appropriation.

While there is some evidence indicating that the defendant used the water freely, and perhaps on one or two occasions more than was actually necessary (though this is contradicted), which, it may be admitted, was in excess of the amount he was entitled to use, if more than was actually necessary at the time, although within the original appropriation, yet it was plainly not these acts which caused the ditch and its channel to become dry during all the season, producing the grievances complained of. It was due to the more potential causes of a drought, aided by the other causes. Every one had a short crop those years, for they were years of drought, is the tenor of the evidence. So that if the complaint was framed on this phase of the facts, no case is made upon which relief could be granted by injunction, much less when it is framed upon the grounds of riparian proprietorship of a natural watercourse running through his lands from time immemorial, which is a different matter, and governed by different rules of law. In any view, therefore, there is a failure of proofs to justify the exercise of the jurisdiction invoked, which is always applied cautiously, and only when the right to the matter in question is clearly established, and an injurious interruption of such right ought to be prevented.

The decree must be affirmed, and it is so ordered.

**WATERCOURSES — WHAT CONSTITUTE.** — To constitute a watercourse, it is not necessary that the water flow in the bed or channel of the stream all the year. *Spangler v. San Francisco*, 84 Cal. 12; 18 Am. St. Rep. 158, and note. A natural watercourse exists where the face of the country is such as necessarily to collect in one body so large a quantity of water after heavy rains and the melting of large bodies of snow as to require an outlet to some common reservoir, and where such water is regularly discharged through a well-defined channel which the water has made for itself, and which is the accustomed channel through which it has flowed from time immemorial: *Earl v. De Hart*, 12 N. J. Eq. 280; 72 Am. Dec. 395, and note; *Schnittius v. Bailey*, 48 N. J. Eq. 409; but water flowing in no defined channel, the course of which can be traced only by the deeper green of the grass moistened by it, is not a watercourse: *Bloodgood v. Ayers*, 108 N. Y. 400; 2 Am. St. Rep. 443, and note.

**WATERCOURSES — DIVERSION BY NATURAL CHANNELS.** — Water discharged from an artificial into a natural channel, without any intention to reclaim it, is abandoned, and becomes a part of the natural stream and subject to the same rights: *Schuls v. Sweeny*, 19 Nev. 359; 3 Am. St. Rep. 888, and note; see *Macomber v. Godfrey*, 108 Mass. 219; 11 Am. Rep. 349.

**WATERCOURSES — APPROPRIATION — BENEFICIAL USE.** — The common-law doctrine giving a riparian owner a right to the flow of the stream in its natural channel upon and over his lands, even though he makes no beneficial use of it, is inapplicable in Colorado: *Hammond v. Rose*, 11 Col. 524; 7 Am. St. Rep. 258. To constitute a legal appropriation, water diverted must be applied within a reasonable time to a beneficial use: *Wheeler v. Northern Colorado Irr. Co.*, 10 Col. 582; 3 Am. St. Rep. 603, and note; *Hindman v. Risor*, 27 Or. 112.

**WATERCOURSES — WATER AS AN APPURTENANCE TO LAND.** — Riparian rights are appurtenant to the land, running with it as an incorporeal hereditament: *Alta Land etc. Co. v. Hancock*, 85 Cal. 219; 20 Am. St. Rep. 217, and note. A water right acquired and used for a beneficial purpose in connection with realty is an appurtenance thereto, and as such, unless reserved, passes with a conveyance of the land: *Sweetland v. Olsen*, 11 Mont. 27; *Orooker v. Benton*, 93 Cal. 365.

## MCDANIEL v. MAXWELL.

[21 OREGON, 302.]

**ASSIGNMENT OF PART OF DEMAND AT LAW.** — A part of an entire demand cannot be assigned at law so as to enable the assignee to bring an action upon it without the consent of the debtor.

**ASSIGNMENT OF PART OF DEMAND IN EQUITY.** — Parts of a single demand may be assigned to different parties in equity, and the rights of all the parties settled in one suit brought by a single assignee. In such suit, not only the debtor and assignor, but all assignees or claimants to any part of the fund, can be made parties, so that one decree may determine the duty of the debtor to each claimant, and his rights and interests be fully protected thereby.

**ASSIGNMENT OF PART OF DEMAND IN EQUITY — NOTICE TO DEBTOR.** — An assignment of a specific part of a particular fund, sum of money, or debt

actually due or to become due, is valid in equity, and vests an equitable property therein in the assignee, so that after notice thereof to the debtor, he is bound to apply the fund according to the terms of the assignment.

**ASSIGNMENT OF PART OF DEMAND IN EQUITY.** — AN ORDER drawn upon the debtor for a valuable consideration, payable out of a designated fund or debt, actually due or to become due, operates, when delivered to the payee, as an equitable assignment or appropriation of such fund *pro tanto*, and no acceptance by the drawee is necessary to its validity.

**ASSIGNMENT OF PART OF DEMAND IN EQUITY.** — NO PARTICULAR FORM of words or writing is necessary to affect an equitable assignment of a part of a specific debt or fund due or to become due. It may be wholly in writing or in parol or partly in both, but it must designate the particular fund upon which it is intended to operate.

**GARNISHMENT.** The defendant, Maxwell, a street contractor, executed and delivered to the Commercial National Bank of Portland an order on the auditor of that city, directing him to deliver to said bank all warrants drawn in favor of said Maxwell on account of street improvements made by him, and authorizing the bank to receipt for and indorse such warrants in his name. Before the bank had received any of the warrants, Maxwell executed and delivered orders thereon in favor of the Wah Sing Company and one Weeks for money due them by him. These orders were presented to the bank and placed on file before it received any city warrants, under a parol agreement between all the parties thereto, that the bank, after reimbursing itself for advances made to Maxwell, should apply the remainder of the proceeds of such warrants, when collected, to the payment of the orders in the order in which they were presented. The bank afterwards received city warrants in favor of Maxwell for \$1,669.50, and before it had applied any of the proceeds, was served with garnishment process in the present suit. The court below decided that the orders constituted an equitable assignment of a designated portion of the funds in the hands of the bank, and entered judgment in its favor, from which the plaintiff appealed.

*J. J. Johnson*, for the appellant.

*Sears and Beach*, for the respondent.

**BEAN, J.** The only question necessary for us to consider on this appeal is, whether the orders from Maxwell on the garnishee in favor of Wah Sing Company and R. Weeks, under the facts of this case, operated as an assignment or appropriation *pro tanto* of the funds to be collected by the garnishee on the warrants assigned to it by Maxwell.

It is universally recognized that at law a part only of an entire demand cannot be assigned so as to enable the assignee to bring an action upon it without the consent of the debtor, for the sufficient reason that it would subject the debtor to a multiplicity of actions at the instance of each assignee of a separate portion of the debt, and thereby subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his contract, and decline to recognize any assignments by which it may be separated into distinct portions. When he undertakes to pay an entire sum to his creditor, it is no part of his contract that he shall pay it in fractions to other parties. His obligation is single, and he should not be harassed with different actions to recover parts of the one demand. In equity no such consequences could result. If parts of a single demand be assigned to different persons, the rights of all the assignees can be settled in one suit. In a suit by one assignee, not only the debtor and assignor, but all other assignees or claimants to any part of the fund, can be made parties to the suit, so that one decree may determine the duty of the debtor to each claimant, and his rights and interests be fully protected; and hence the reason for the rule at law does not exist in equity. Where one has agreed, for a valuable consideration, that another shall have part of a debt or demand due him from a third person, and has made a transfer of such part, manifest justice requires that the agreement should be enforced, when it can be done without prejudice to the debtor.

While there is some confusion in the books, we think the better rule, as supported by the decided weight of authority, is, that an assignment of a part of an entire demand is good in equity, and the debtor is bound after notice of the assignment to so apply the fund, and that an order drawn upon a third person for a valuable consideration from the payee, payable out of a designated fund then due or to become due, operates when delivered to the payee as an equitable assignment or appropriation of the fund *pro tanto*, and no acceptance by the drawee is necessary: 3 Pomeroy's Eq. Jur., sec. 1280; *Brill v. Tuttle*, 81 N. Y. 454; 37 Am. Rep. 515; *First National Bank v. Kimberlands*, 16 W. Va. 555; *Harris County v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467; *Hutchinson v. Simon*, 57 Miss. 628; *James v. City of Newton*, 142 Mass. 366; 56 Am. Rep. 692.

By such an assignment, the assignee obtains an interest in the property or fund, and not simply a right of action against the drawee. In order, therefore, that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt actually existing or to become due in the future, and the order must be in effect an assignment of that particular fund, or some designated portion thereof. No particular form of words or particular form of instrument is necessary to effect such assignment. Any binding appropriation of it to a particular use is an assignment, or, what is the same, a transfer of the ownership: Drake on Attachment, sec. 610.

"The sure criterion," says Mr. Pomeroy, "is, whether the order or direction of the drawee, if assented to by him, would create an absolute personal indebtedness payable at all events, or whether it creates an obligation only to make payment out of the particular designated fund": 3 Pomeroy's Eq. Jur., sec. 1280. Since the assignee obtains not simply a right of action against the holder of the fund, but an equitable property in the fund itself, it follows that when the assignment is by means of a written order, unless it specifies the particular fund or debt out of which its payment is to be made, it cannot operate as an equitable assignment: *Purcival v. Dunn*, 29 Ch. Div. 128; *Phillips v. Stagg*, 2 Edw. Ch. 108; *Shaver v. Western Union Tel. Co.*, 57 N. Y. 459.

As to what will constitute a sufficient designation of the particular fund out of which the order is to be paid within the meaning of this rule, the authorities are in the utmost confusion. It is a question of intention, to be gathered from the language of the instrument construed in the light of surrounding circumstances. The difficulty lies rather in the true construction to be put upon the order than the legal principle applicable in a given case. The difficulty is in determining whether the order is to be paid out of a given fund or not, and the question in all of this class of cases is the same, and must be determined according to the circumstances of each case. "The true test would seem to be," says Dwight, C., in *Munger v. Shannon*, 61 N. Y. 255, "whether the drawee is confined to the particular fund, or whether, though a specified fund is mentioned, he would have the power to charge the bill up to the general account of the drawee, if the designated fund should turn out to be insufficient." It may well be doubted whether the orders from Maxwell to Wah Sing Company and R. Weeks

sufficiently specify the particular fund out of which they were to be paid to operate as an assignment, but the subsequent agreement among the garnishee, Maxwell, and the payees named in the orders, at the time the orders were presented and placed on file, by which the garnishee, after reimbursing itself for advances made to Maxwell out of the proceeds of the city warrants, when collected, should apply the remainder in payment of these orders, can leave no doubt as to the fund intended. By this agreement, the fund out of which these orders were to be paid was particularly designated, and the garnishee herein assumed no personal liability, but only obligated itself to make payment out of this fund, when it should come into its possession, and this arrangement was made with the assent of all the parties. When, as in this case, the debt is not evidenced by a writing, it may, by the assent of the debtor, be assigned even by a verbal agreement; and when such assent is given, the assignment is complete: *Drake on Attachment*, sec. 614. The fact that the orders in this case are in writing did not prevent the parties from afterwards agreeing upon some particular fund out of which they should be paid; and when such fund was designated, the orders, together with such subsequent agreement, operated as an equitable assignment or appropriation *pro tanto* of such specified fund: *Moore v. Lowrey*, 25 Iowa, 336; 95 Am. Dec. 790; *First Nat. Bank v. Kimberlands*, 16 W. Va. 555. The orders were but one step in the assignment; and in order to make it complete, it only remained to designate the particular fund which should be applied to their payment, and this was done by the subsequent verbal agreement.

We are therefore clearly of the opinion that when the orders were presented to and received by the garnishee, under the agreement of the parties above mentioned, they operated as an equitable assignment or appropriation *pro tanto* of the fund, to be received by the garnishee from the city of Portland on the warrants in Maxwell's favor, and that it is bound to so apply the fund, and consequently cannot be charged as garnishee of Maxwell.

The judgment of the court below is therefore affirmed.

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WHEN AND TO WHAT EXTENT AN ASSIGNMENT OF PART OF A FUND ON DEMAND is enforceable has been already treated of in a note to *Harris County v. Campbell*, 2 Am. St. Rep. 472-475. It is therefore necessary to note only such later decisions as relate to this subject. *Harris County v. Campbell* 68

Tex. 22, 2 Am. St. Rep. 467, was cited and followed in *Clark v. Gillespie*, 70 Tex. 513, on the point that an assignment of part of a chose in action for a valuable consideration is good in equity, and may be effected either by a direct transfer, or by an order drawn upon the particular fund. This rule is also supported by the following cases: *Hall v. Flanders*, 83 Me. 242; *Phillips v. Ebsall*, 127 Ill. 535; *Brown v. Dunn*, 50 N. J. L. 111; *Texas etc. Ry Co. v. Gentry*, 69 Tex. 625; *Kingsbury v. Burrill*, 151 Mass. 199; *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246.

In *Hall v. Flanders*, 83 Me. 242, it was decided that an order must be made upon a particular fund, not couched merely in general terms, to operate as an assignment *pro tanto* of the amount therein named. For, as was held in *Cashman v. Harrison*, 90 Cal. 297, an order, not specifying any particular fund for payment, will not operate as an equitable assignment, or give the holder, either in law or equity, a lien upon funds of the creditor in the hands of the debtor upon whom it is drawn until after acceptance. Still such an assignment of a fractional part of a claim may be good in equity, when the person who is to pay raises no objections to the arrangement: *Kingsbury v. Burrill*, 151 Mass. 199.

In *Texas etc. Ry Co. v. Gentry*, 69 Tex. 625, the court said: "A partial assignment of a chose in action is good in equity, though the legal title remains with the assignor"; but "that the holder of the legal title of a chose in action may bring suit upon it in his own name, although the equitable right may be in another. The equitable owner is a proper but not a necessary party, unless the debtor have some legal defense against him alone."

In *Holbrook v. Payne*, 151 Mass. 383, 21 Am. St. Rep. 456, an order by a creditor directing his debtor to pay a third person a certain sum of money left with the debtor, or its officers, was held not to constitute an assignment of any part of the debt, inasmuch as the order was negotiable upon its face, and did not purport to be drawn against any particular fund.

This subject is taken somewhat in detail and carefully discussed in *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246. Green, V. C., in delivering the opinion in that case, used the following language: "It is settled that an assignment for a valuable consideration of a sum of money due or to grow due on the performance of an existing contract, will, on notice thereof being given to the debtor, operate at once, or when the fund is created, as an equitable assignment of so much of the fund as is covered thereby, subject to all valid prior charges: *Superintendent etc. v. Heath*, 15 N. J. Eq. 22; *Shannon v. Mayor of Hoboken*, 37 N. J. Eq. 123; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Brokaw v. Brokaw*, 41 N. J. Eq. 304; *Lauer v. Dunn*, 115 N. Y. 405; 3 Pomeroy's Eq. Jur., sec. 1280. While, properly speaking, an assignment cannot be made of a subject which does not exist, such as a fund to become due on the future performance of a subsisting contract, yet equity, on the possible debt ripening into an enforceable specific money liability, treats the agreement as an assignment *pro tanto* of the fund, and by force thereof vests the equitable title to the money in the assignee: *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435, and note; *Hall v. Buffalo*, 1 Keyes, 193; *Brill v. Tuttle*, 81 N. Y. 454, 457; 37 Am. Rep. 515; *Brown v. Dunn*, 50 N. J. L. 111, 113; 3 Pomeroy's Eq. Jur., secs. 1280, 1283, note 2. To impound the amount in the hands of the debtor, notice of the assignment must be given to him, but no particular form of notice is required; any writing or act which clearly indicates that the assignor intends to make over the fund belonging to him amounts in equity to an assignment of the fund: *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 171; *Lyon v. Bower*, 30 N. J. Eq. 340; *Shannon v. Mayor*, 37 N. J. Eq.



123. On notice being given to the debtor, and the sums being earned under the contract, the debtor becomes trustee or *quasi* trustee for the assignee as to the amount assigned, subject to existing equities and valid prior charges thereon: *Hall v. Buffalo*, 1 Keyes, 193. From this it follows that neither payment to nor a release or discharge by the assignor, after notice of the assignment, can affect the rights of the assignee against the debtor: *Jones v. Farrell*, 1 De Gex & J. 208; *Brill v. Tuttle*, 81 N. Y. 454; 37 Am. Rep. 515; *Field v. Mayor*, 6 N. Y. 179; 57 Am. Dec. 435; *North Bergen v. Eager*, 41 N. J. L. 184; 2 Pomeroy's Eq. Ju., sec. 704. It is evident from this statement of the incidents of an equitable assignment that acceptance by the debtor of the order or assignment is not, in equity, necessary to its validity as a transfer *pro tanto* of a fund in his hands. It takes effect from the acts of the assignor and assignee, and the debtor, so far as the right to the fund is concerned, is but the instrument through whom the transfer is to be actually made. The debtor's acceptance or promise gives the assignee an action at law against him, not on the assignment, but on the promise; in equity it neither creates, increases, or diminishes his liability to the assignee: 3 Pomeroy's Eq. Jur., sec. 1280, and note 1."

In *Brown v. Dunn*, 50 N. J. L. 111, it is decided that an equitable assignment of a certain part of a sum to be realized on an execution upon a judgment at law will be protected by the court from which issued the execution, and the sheriff will be compelled to pay the money collected under the execution into court, that the rights of the assignee may be preserved.

The right to refuse to recognize partial assignments of a debt by a creditor is personal to the debtor, and cannot be claimed by a third party who sues the creditor and joins the debtor by trustee process.

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## CRIBBEN v. DEAL.

[21 OREGON, 211.]

**DEEDS — EXECUTION OF, IN BLANK.** — When a deed is executed and acknowledged by the grantor, with a blank left therein for the name of the grantee, the grantor may, by parol, authorize a third person to insert the name of such grantee, and when so filled out and delivered, it becomes a valid deed.

*W. M. Gregory*, for the appellant.

*Killin, Starr, and Thomas*, for the respondent.

**LORD, J.** This is a suit in equity, brought by the plaintiffs to have a deed of general assignment set aside and declared void, and to have the attached property applied in payment of their judgment. The single proposition of law involved is, whether the name of the grantee can, by some one authorized upon parol authority of the grantor, be inserted in a blank left in a deed of general assignment, after the deed has been signed, sealed, and acknowledged, but before delivery. For the purposes of this case, the facts are these: That the deed

of assignment was made on the 17th of November, 1888, by C. E. Deal, J. C. O'Reilly, and J. W. Brockett, partners doing business under the firm name of Deal, O'Reilly, & Co., to Thomas Connell for the benefit of creditors; that it was in all things completed and signed and sealed and acknowledged, except that a blank was left for the name of the grantee; that Mr. F. A. E. Starr was authorized to insert as the name of such grantee any person satisfactory to himself and the members of such firm; that on the following day, Mr. Starr, with the consent of the members of such firm, inserted the name of Thomas Connell as assignee in such deed, and the deed was delivered to Thomas Connell, and on the next day was recorded. Upon this state of facts, the contention is, that such deed is void because the name of Thomas Connell was not inserted when the deed was signed and sealed.

It is said in Sheppard's Touchstone, 54, that "every deed well made must be written, i. e., the agreement must all be written before the sealing and delivery of it; for if a man seal and deliver an empty piece of paper, or parchment, albeit he do therewithal give commandment that an obligation or other matter shall be written in it, and this be done accordingly, yet this is no good deed." This is founded upon that ancient and technical rule of the common law, that the authority to make a deed, or to alter or fill a blank in some substantial part of it, cannot be verbally conferred, but must be created by an instrument of equal dignity. As the deed was under seal, to alter or complete it by the insertion of the name of the grantee required the authority to be under seal. So firmly rooted was this principle, that it mattered not with what solemnities a deed may have been signed and sealed, unless the grantee's name was inserted, and delivery was made by him, or some one legally authorized under seal, it was a nullity. It imposed no liability on the party making it, nor conferred any rights upon the party receiving it; it was, in fact, no deed. Hence, it was held that parol authority to fill a blank with the name of a grantee could not be conferred without violating established principles of law, and rendering the deed void. This doctrine still prevails in England.

It is true that in the case of *Texira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 225, Lord Mansfield held otherwise; but this was in effect overruled in *Hibblewhite v. McMorine*, 6 Mees. & W. 200, on the ground that an authority to execute a sealed instrument could not be given by parol, but must be given by

deed, although this latter case seems more or less trenched upon by the decision in *Eggleston v. Gutteridge*, 11 Mees. & W. 465, and by *Davison v. Cooper*, 11 Mees. & W. 778, and in *West v. Steward*, 11 Mees. & W. 47. But the rule has never been universally accepted in this country; and however the holding of some courts may be, still the better opinion and the prevailing current of authority is, that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name of such grantee, and that when so filled out and delivered, it is a valid deed.

It is true that Chief Justice Marshall, in *United States v. Nelson*, 2 Brock. 74, felt bound to follow the ancient rule, but his opinion clearly indicates he felt that the authority to fill a blank in an instrument under seal should be held to be valid. He says: "The case of *Speake v. United States*, 9 Cranch, 28, in determining that parol evidence of such assent may be received, undoubtedly goes far toward deciding it, and it is probable that the same court may completely abolish the distinction in this particular between sealed and unsealed instruments." Again: "If this question depended on those moral rules of action which in the ordinary course of things are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties at the time of its execution intended it should have." And he concludes with this statement: "I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on the verdict is, in my opinion, with the defendants."

The rule was purely technical, and the outgrowth of a state of affairs and condition of the law which does not now exist. The reason of the law is the life of it, and when the reason fails, the law itself should fail. At the present day the distinction between sealed and unsealed instruments is fast disappearing, and the courts are gradually doing away with them. As Judge Redfield said: "But it [the rule] seems to be rather technical than substantial, and to found itself either on the policy of the stamp duties, or the superior force and sacredness of contracts by deed, both of which have little importance in this country. And the prevailing current of American authority, and the practical instincts and business experience and sense of our people, are undoubtedly otherwise": 1 Redfield on Law of Railways, 124.

In *Drury v. Foster*, 2 Wall. 24, the court says: "Although it was at one time doubted whether parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion of this day is, that the power is sufficient." Again in *Allen v. Withrow*, 110 U. S. 119, the court says: "It may be and probably is the law in Iowa, as in several states, that the grantors in a deed conveying real property, signed and acknowledged with a blank for the name of a grantee, may authorize another party by parol to fill up the blank." "But," he continues, "there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In the case at bar these conditions were fulfilled.

In *Inhabitants etc. v. Huntress*, 53 Me. 89, 87 Am. Dec. 535, the court held that a party executing a deed, bond, or other instrument, and delivering the same to another as his deed, knowing there are blanks in it to be filled necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it. In delivering the opinion of the court, Kent, J., said: "The rule invoked is purely technical. Practically there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange; both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." Likewise in *Bridgeport Bank v. New York etc. R. R. Co.*, 30 Conn. 274, Ellsworth, J., said: "Nor can any reason be assigned which is founded in good sense, and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it after it is executed as well as any other contract in writing, where the parties have so agreed at the time. In either case the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient

law of England, can justify the making of any distinctions between them."

It is to be noted that both of these adjudications were by courts of states where seals were not abolished. In *Burnside v. Wayman*, 49 Mo. 357, where the name of a grantee in a trust deed was left in blank, Wagner, J., said: "It is contended that no recovery could be had or relief granted on the first count, because no grantee was named in the deed of trust, and that in consequence thereof the instrument was void, and no title conveyed; but we think otherwise. Whatever may have been determined in some of the old books, the better doctrine is against such a position." And subsequently, in *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435, this doctrine was affirmed in all its breadth, the court saying: "A deed regularly executed in other respects, with a blank left therein for the name of the grantee, and placed in that condition in the hands of a third person with verbal authority, but no authority under seal from the person who executed it, to fill up the blank in his absence, and deliver the deed to the person whose name is inserted as grantee, when so filled out and delivered is a valid deed." In *Duncan v. Hodges*, 4 McCord, \*239, 17 Am. Dec. 734, it is held that a deed executed with blanks, and afterwards filled up and delivered by the agent of the party, is good. So in *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486, it was held that where a note and mortgage otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure from whomsoever he could a loan of money thereon for the maker, this shows an intention that the agent should fill the blanks, and when so filled the instruments were valid without a new execution and delivery. And the same doctrine was expressly affirmed in *Schintz v. McManamy*, 33 Wis. 301, the court, by Lyon, J., saying: "It was doubtless competent for the grantors to authorize Emil by parol to insert the name of the grantee in the deed after they had signed and acknowledged the same." And in *State v. Young*, 23 Minn. 551, it was held that authority to fill a blank in a sealed instrument may be given by parol, and that such authority may be either express or implied from circumstances, and that it may be implied from circumstances whenever these, fairly considered, will justify the inference. So in *Swartz v. Ballou*, 47 Iowa, 188. 29 Am. Rep. 470, where the owner of land executed a deed in blank and placed it in the hands of another

party under circumstances which raised an implied authority in the latter to insert the name of the grantee, it was held that the insertion of the grantee's name, either by the party receiving the deed or by some one authorized by him, made the instrument perfect as a conveyance.

Without referring to the authorities at greater length, there are numerous other cases supporting the same doctrine: *Wiley v. Moor*, 17 Serg. & R. 438; 17 Am. Dec. 696; *Smith v. Crooker*, 5 Mass. 538; *Gibbs v. Frost*, 4 Ala. 720; *Wooley v. Constant*, 4 Johns. 54; 4 Am. Dec. 246; *Ex parte Decker*, 6 Cow. 60; *Richmond Mfg. Co. v. Davis*, 7 Blackf. 412; *Boardman v. Gore*, 28 N. J. Eq. 517; 18 Am. Dec. 73; *Camden Bank v. Hall*, 14 N. J. L. 583; *Ragsdale v. Robinson*, 48 Tex. 379. The contrary rule was adopted in *Upton v. Archer*, 41 Cal. 85; 10 Am. Rep. 266; *Preston v. Hull*, 22 Gratt. 600; 14 Am. Dec. 153; *Ingram v. Little*, 14 Ga. 173; 58 Am. Dec. 549.

It seems to us that the weight of authority and better opinion is, that parol authority is sufficient to authorize the filling of a blank by the insertion of the name of the grantee in a deed after its execution but before delivery, as in the case at bar. There is no pretense of any mistake or fraud, or that the blank was not filled as authorized and directed. In a word, that it was filled by a party authorized to fill it, and was done after its execution and before its delivery to the grantee named. Nor is it questioned but what the deed faithfully expresses the intention of the parties, and was duly executed for the purposes specified; and in such case it seems to us complete effect ought to be to that intention, notwithstanding the technical rule of the common law in respect to such instruments. As Mr. Justice Swayne said: "If a person competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent, with an express or implied authority to fill up the blank and perfect the conveyance, its validity could not be well controverted": *Drury v. Foster*, 2 Wall. 24.

It results that the decree dismissing the bill must be sustained.

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**DEEDS — EXECUTION IN BLANK.** — Where a deed duly signed and acknowledged, but with the name of the grantee and the consideration left blank, is forwarded to an agent to negotiate the sale and deliver the deed, such agent, so far as third persons without knowledge of the circumstances are concerned, is presumed to have authority to fill such blanks: *Oinen v. Perry*, 25 Iowa, 412; 96 Am. Dec. 49, and note; note to *Upton v. Archer*, 10 Am. Rep. 267; see *McCleery v. Wakefield*, 76 Iowa, 529; also numerous authorities cited in the opinion to the leading case.

## BROWN v. BIGNÉ.

[21 OREGON, 260.]

**CHAMPERTY — PURCHASE OF RIGHT IN LITIGATION.** — The purchase of a right which is or may become the subject-matter of a pending suit by one standing in no fiduciary relation does not constitute champerty, and is not unlawful unless made for the mere purpose of perpetuating strife and litigation; and it makes no difference that the consideration for the purchase is to be used in conducting the litigation and paying the expenses thereof.

**CHAMPERTY — CONTRACT TO SUSTAIN LITIGATION.** — A fair *bona fide* agreement by a layman to supply funds to carry on pending litigation, in consideration of having a share in the property in dispute if recovered, is not *per se* void, either on the ground of champerty or of public policy; but if such contract is made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, it is within the doctrine of champerty, and should not be enforced.

**ACTION** to enforce the specific performance of a written contract. In April, 1881, one Manciet died, largely indebted, leaving heirs and a large estate, chiefly of real property standing in his name, but in which the defendant Bigné claimed a one-half interest as a partner. His claim was resisted by the Manciet heirs, and being without means, except his alleged interest in the Manciet estate, he asked the plaintiff, Brown, for financial assistance to enable him to establish his claim. Brown and Bigné entered into the contract in suit, by which it was agreed that, in consideration of six thousand dollars to be advanced by Brown as might be necessary to carry on the litigation between Bigné and the Manciet heirs, to establish the claim of the former, he sold, assigned, and transferred to Brown an undivided one-half interest in and to all his right, title, and interest to any property or claim recovered by him in such litigation. He established his claim as a partner, and recovered judgment for one half of the estate and assets claimed by the Manciet heirs, and then sought to repudiate the contract in suit. Judgment for plaintiff, and defendant appealed.

*James Gleason*, for the appellant.

*Thomas N. Strong*, for the respondent.

**BEAN, J.** The only question in this case is, whether the contract between plaintiff and Bigné is champertous and void. The solution of this question depends upon how far the au-

cient doctrine of champerty and maintenance is to be recognized in this state.

It is conceded at the outset that the contract in suit was honestly and fairly made, and that Brown acted in entire good faith in the matter. No advantage was sought or taken of Bigné; he was fully informed as to the extent, amount, and value of the property claimed by him, and it was at his earnest solicitation that Brown made the contract. When he was without means or credit to prosecute his claims, and sore pressed by the Manciet heirs, who sought to exclude him from his share in the estate, he applied for aid in the struggle to Brown, who thereupon in good faith entered into the contract and advanced the money to enable him to prosecute his claim, upon no other security for its repayment than the assignment of a one-half interest in the property in litigation. Under these circumstances, the defense of Bigné may be considered anything but meritorious.

Under the ancient doctrine of champerty, the contract in suit is clearly void, for that offense was defined to be a bargain with a plaintiff or defendant to divide the land or other matter in suit between them, if they prevailed; whereupon the champertor was to carry on the suit at his own expense: 4 Bla. Com. 135. Some of the authorities omit from their definition the statement that the champertor is to carry on the suit at his own expense, and confine it simply to an agreement to aid a suit, and then divide the thing recovered: 1 Hawk. P. C., c. 84, sec. 1; Co. Lit. 368 b.

The doctrine of champerty and maintenance, the gist of which is the same, differing only in the mode of compensation, arose from causes peculiar to the state of society in which it was established. The most potent reason for their suppression was an apprehension that justice itself would be endangered by these practices. The doctrine was established "to repress the practices of many who, when they thought they had title or right to any land, for the furtherance of their pretended right, conveyed their interest or some part thereof to great persons, and with their countenance did oppress the possessors. The power of great men, to whom rights of action were transferred in order to obtain support and favor in suits brought to assert these rights, the confederacies which were thus formed, and the oppression which followed from the influence of great men, in such cases, are themes of complaint



in the early books of the English law": *Seywright v. Page*, 1 Leon, 167.

Blackstone speaks of these offenses as perverting the process of the law into an engine of oppression: 4 Bla. Com. 135. So great was the evil of rich and powerful barons, buying up claims, and by means of their exalted and influential positions overawing the courts, and thus securing unjust and unmerited judgments and oppressing those against whom their anger was directed, that it became necessary in an early day in England to enact statutes to prevent such practices, and to invoke in all its rigor the doctrine against champerty and maintenance. The common-law rule prohibiting the assignment of choses in action, and the sale and transfer of land held adversely, was a branch of this same doctrine, and arose from the same causes.

Lord Coke says: "Nothing in action, entry, or re-entry can be granted over, for so under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." And Buller, J., in *Masters v. Miller*, 4 Term Rep. 320, says: "It is laid down in our old books that for avoiding maintenance, a chose in action cannot be assigned." But he adds: "The good sense of that rule seems to me very questionable, and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action." Under the circumstances above indicated, to allow rich and powerful persons to buy up claims, or to assist in the litigation with money to enable the plaintiff or defendant to prosecute or defend his cause of action or defense, was undoubtedly dangerous to the liberty of the subject, and sound public policy forbade it. With the advance of time came the change of circumstances, and in modern times, since England has enjoyed a pure and firm administration of justice, even in that country the rigor of the common law against champerty and maintenance has been very much softened; so that now not only the assignability of choses in action is generally recognized in that country, but it is said there is no rule of law which prohibits the purchase of the subject-matter of a pending lawsuit, although accompanied with an agreement to indemnify the vendor against costs and expenses: *Knight v. Bowyer*, 2 De Gex & J. 421. Nor is a contract to support a pending litigation in consideration of having a stipulated part of the money or thing recovered

*per se* void as against public policy: *Coondo v. Mookerjee*, L. R. 2 App. Cas. 186.

In this country, where no aristocracy or privileged class elevated above the mass of the people has ever existed, and the administration of justice has been alike impartial to all, without regard to rank or station, the reason for the ancient doctrine of champerty and maintenance does not exist, and hence has not found favor in the United States: *Roberts v. Cooper*, 20 How. 467; *Thalheimer v. Brinckerhoff*, 3 Cow. 623; 15 Am. Dec. 309. In some of the states the whole doctrine is regarded as entirely obsolete: *Mathewson v. Fitch*, 22 Cal. 86; *Bentinck v. Franklin*, 38 Tex. 458. But the doctrine in a more or less modified form is generally recognized in a great majority of the states of the Union, and contracts which come within the mischief to be guarded against in the administration of justice are held to come within the rule: *Lathrop v. Amherst Bank*, 9 Met. 489; *Gilbert v. Holmes*, 64 Ill. 548; *Barker v. Barker*, 14 Wis. 142; *Lafferty v. Jelley*, 22 Ind. 471; *Halloway v. Lowe*, 7 Port. 488; *Weakly v. Hall*, 13 Ohio, 167; 42 Am. Dec. 194; *Backus v. Byron*, 4 Mich. 535; note to *Thalheimer v. Brinckerhoff*, 15 Am. Dec. 319.

To meet the changed condition of society and administration of justice, the rule has been much modified, so that upon modern construction the doctrine of champerty and maintenance as regards a layman is confined to cases where a man, for the purpose of stirring up strife and litigation, encourages others either to bring actions or to make defenses which they have no right to make or otherwise would not make; such interference is considered as having a tendency to pervert the course of justice: *Dorwin v. Smith*, 35 Vt. 69; *Findon v. Parker*, 11 Mees. & W. 675; *Stanley v. Jones*, 7 Bing. 369. The gist of the offense consists in the officious intermeddling in another suit, and contracts not within the mischief to be guarded against should not be held to come within the rule.

It may now be stated as a general rule that a man may sell the whole or part of a thing in action as well as the whole or part of a thing in possession. The right of disposition is involved in the very idea of property. With few exceptions, not material here, whatever a man may own he may sell; and whatever a man may lawfully sell, another man may lawfully buy. And whenever a man has bought anything in the nature of property, he is entitled to all the remedies the law may afford to enable him to possess and enjoy it. It follows that

there is now no rule of law which prohibits the purchase of anything otherwise capable of assignment merely because it may become the subject of a lawsuit. From this it logically follows that the purchase of a right, which is the subject-matter of a pending lawsuit, by one standing in no fiduciary relation, is not unlawful, unless it be made for the mere purpose or desire of perpetuating strife and litigation; nor can it make any difference on principle or authority that the consideration for the purchase is to be used in conducting the litigation and paying the expenses thereof. A fair *bona fide* agreement by a layman to supply funds to carry on a pending suit, in consideration of having a share in the property if recovered, it seems to us ought not to be regarded as *per se* void, either on the grounds of champerty as now understood or of public policy. Indeed, it may sometimes be in furtherance of justice and right that a suitor who has a just title to property, and no means except the property itself, should be assisted in that way. The doctrine of champerty is directed against speculation in lawsuits, and to repress the gambling propensity of buying up doubtful claims. It is not and never was intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it: 1 Addison on Contracts, 392; *Stotsenburg v. Marks*, 79 Ind. 193.

But agreements of the kind above suggested should be carefully watched and closely scrutinized when called in question. and if found to have been made not with a *bona fide* object of assisting a claim believed to be just, but for the purpose of injuring and oppressing others by aiding in unrighteous suits, or for the purpose of gambling in litigation or to be so extortionate or unconscionable as to be inequitable against the party, effect ought not to be given to them. Courts administering justice according to the broad principles of equity and good conscience, as they are bound to do, will consider whether the transaction is merely the *bona fide* acquisition of an interest in the subject of litigation, or whether it is an unfair or illegitimate transaction, gotten up for the purpose merely of spoil or speculation. The doctrine of champerty, to the extent that furnishing aid in a suit under an agreement to divide the thing recovered is *per se* void, we think ought not to prevail when such aid is furnished by a layman; but when such contracts are made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, they come within

the analogy and principles of that doctrine, and should not be enforced: *Gilbert v. Holmes*, 64 Ill. 548; *Propeller Mohawk*, 8 Wall. 153; *Boardman v. Thompson*, 25 Iowa, 487.

Applying these principles to the case in hand, we find that the contract between plaintiff and defendant was entered into in entire good faith, and with no intention on the part of plaintiff of officiously intermeddling in the controversy between Bigné and the Manciet heirs, but only at Bigné's earnest solicitation to enable him to obtain means to prosecute his claim. The contract was not unconscionable or unjust, but fairly entered into. Bigné had no means except the property in litigation; and the taking by plaintiff of an assignment of a one-half interest therein as a consideration for the money advanced by him violated no principle of law or public policy so far as we can see from this record.

What was said by Thayer, J., in relation to the doctrine of champerty in *Dahms v. Sears*, 13 Or. 47, is in regard to contracts between attorney and client, and has no application here. The relation of attorney and client did not exist between Brown and Bigné, and this opinion is confined to the case before us.

The decree of the court below is therefore affirmed.

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CHAMPERTY. — For a discussion of this subject, see note to *Manning v. Sprague*, 12 Am. St. Rep. 512; extended note to *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 316. Champerty is a bargain with a plaintiff or defendant for a portion of the matter sued for in case of a successful termination of the suit which the champertor undertakes to carry on at his own expense: *Nickels v. Kane*, 82 Va. 309. The whole doctrine of maintenance as it existed at common law "has been so modified in recent times as to confine it to strangers who, having no valuable interest in a suit, pragmatically interfere in it for the improper purpose of stirring up litigation and strife": *Gilman v. Jones*, 87 Ala. 691. A sale of claims for work performed and materials furnished for the construction of a free gravel road is not champertous, but is authorized by the code: *Hart v. State*, 120 Ind. 83.

**MEEKER v. NORTHERN PACIFIC RAILROAD COMPANY.**

[21 OREGON, 512.]

**RAILROADS—LIABILITY FOR INJURY TO ANIMALS ON UNFENCED TRACK.—**

When a statute imposes liability on a railroad company for the killing or injury of stock caused by a moving train upon or near its unfenced track, it includes all such causes as are produced by a moving train that directly contribute to such killing or injury, whether caused by actual collision or not, when the lack of a fence which the company is required to furnish permits the animal so injured or killed to go upon the track. In such case it is immaterial whether the company is guilty of negligence or not.

*Dolph, Bellinger, Mallory, and Simon, for the appellant.*

*McBride and Dresser, for the respondent.*

LORD, J. This was an action brought under section 4044 of Hill's Code, to recover damages for the alleged value of a mare, which had entered upon the railroad track of the defendant company, where the same was unfenced, and while there was driven by a moving train into an open trestle, and so crippled and injured as to be rendered valueless.

The facts tended to show that there were some three or four horses, including the mare, running at large upon a range that entered upon the unfenced track of the defendant's railroad; that not far behind where the horses entered upon the track was an engine and train coming along, and that as soon as the engineer discovered them, he sounded the alarm-whistle of the engine, as is usually given when stock is on the track; and that the horses, becoming frightened at the approaching train, or the sound of the whistle, or both combined, commenced running along the track, followed by the engine and train, until they reached an open trestle on the track, where the mare fell and broke her foreleg just below the knee joint, while the others passed over without injury; that neither the engine nor any part of the train came in actual contact or collision with any of the horses or mare, but was stopped more than one hundred feet before reaching the trestle where the mare fell; that the track along which the horses were running was graded part of the way on the side of a hill, the banks on both sides being steep; and there being not to exceed two places from the place of their entry upon the track to the trestle or place where the mare was injured where they could leave the track without great difficulty or danger. Substantially upon this state of facts, the counsel for the defendant

moved for a nonsuit, upon the ground that the evidence for the plaintiff disclosed no liability, in that the animal was not "touched by any train, car, or engine of the defendant," and that the company is "not liable for frightening the animal." Upon the motion being overruled, the defendant excepted, and the error assigned in this regard constitutes the important question to be determined. That question involves the proper construction of section 4044 of Hill's Code, which provides that "any person, . . . or corporation, . . . owning or operating any railroad, . . . shall be liable for the value of any horses, etc., killed, and for reasonable damages for any injury to any such live-stock upon or near any unfenced track of any railroad in this state, whenever such killing or injury is caused by any moving train or engine or cars upon such track."

The contention for the defendant is, that the killing or injury mentioned in the section has reference only to such as results from or is caused by actual contact of the moving train or engine or cars with the animal killed or injured. If it were intended by the statute that the killing or injury must have been caused by actual collision, — that is, the stock must have been killed or injured by actual contact or collision with a moving train or engine upon such track, — then the defendant is not liable, and the plaintiff cannot recover upon the evidence; for while it is clear that the railroad was not fenced, where the duty to fence existed, by reason of which the horses got upon the track, it is equally clear that none of them was struck by the engine and thereby killed or injured; but that while thus on the track, the mare, like the other horses, becoming frightened, either at the noise of the approaching train or the repeated sounding of the stock-alarm whistle, or both combined, fled down the track, followed by the engine and cars, and ran into the open trestle and was permanently injured, without any actual collision with the engine or cars of the train, or any negligence (as we shall assume) or willful misconduct of the agents in charge of it. Under such circumstances, the defendant claims that the statute does not contemplate any liability; that damages resulting from fright to animals and not from actual collision, where there is no imputation of negligence or willful misconduct on the part of the agents of the corporation, are consequential, and not within the purview of the statute. In support of this construction of the statute, namely, that the death or injury of the animal must be caused by actual collision with the engine or cars of

the train, we are referred to *Peru etc. R. R. Co. v. Hasket*, 10 Ind. 409; 71 Am. Dec. 335; *Ohio etc. R'y Co. v. Cole*, 41 Ind. 331.

In the first case, at the sound of the whistle on the approaching train, the mare ran on the track before the train until she came to a culvert, and then jumped so as to clear the culvert, and fell on the side of the track and broke her left leg, but she was not touched by the engine or any of the cars of the train. Upon this state of facts, the court held that the statute contemplated a direct injury; that the language "shall be killed or injured by the cars, or locomotive, or other carriages," etc., involved the idea of actual collision, and that it would not be consistent with the intent of the act to give the language such an exposition as would cover a case of consequential damages. The court says: "No doubt the train caused the animal to take fright, and the injury was the result of such fright. But suppose the mare, at the sound of the whistle, instead of running upon the road, had run from the road, and while thus running had received an injury, would the company be liable? It seems to us they would not. The principle of the case hypothetically stated would be alike applicable to the case at bar." In the other case, a colt was frightened by a train and ran from an adjoining field upon the railroad track, which was not properly fenced, and broke its leg between the bars of a cow-pit; and as the facts showed that the colt was not injured by the locomotive or cars, or touched by them, it was held that the company was not liable under the statute.

In *Lafferty v. Hannibal etc. R. R. Co.*, 44 Mo. 291, the horses got on the track of the railroad where it was not fenced, and while on the track they were frightened by the train, and in running hurt themselves while jumping off the track, but there was no collision, nor were the animals injured by any actual contact. The words of the statute are, that the company shall be "liable in double the amount of all damages which shall be done by its agents, engines, or cars, to horses-cattle, mules, or other animals on said road." Although the phraseology of the statute differed somewhat from the Indiana statute on this subject, the court thought, in substance and effect, it was identically the same, and held that it contemplated a direct or actual collision between the train and the animal injured.

In *Schertz v. Indianapolis etc. R'y Co.*, 107 Ill. 577, the language of the statute of Illinois is identical with the statute of

Missouri on the same subject; that is, in case of a failure to comply with the provisions of the statute, the railroad corporation should be liable for all damages that might be done by its "agents, engines, or cars." In this case there was no collision, and the horse was not injured by any actual contact; but becoming frightened at the approaching train, ran down the track, and in its flight was injured by jumping a cattle-guard, without any negligence or willful misconduct on the part of the servants of the corporation. Upon these facts, the court thought the statute admitted of the same construction as was given to the Missouri statute, and held that where the stock is not killed or injured by any actual collision, there is no liability on the railroad corporation, saying: "Consequential damages resulting from fright to animals, not caused by any negligence or willful misconduct of the agents of the corporation, are not embraced within the statute": *Louisville etc. R'y Co. v. Smith*, 58 Ind. 575; *Baltimore etc. R'y Co. v. Thomas*, 60 Ind. 107; *Croy v. Louisville etc. R'y Co.*, 97 Ind. 128; *Knight v. New York etc. R. R. Co.*, 99 N. Y. 25; *Holder v. Chicago etc. R. R. Co.*, 11 Lea, 176; *Seibert v. Missouri etc. R'y Co.*, 72 Mo. 565.

Under statutes of this character, it is essential to the liability of a railroad company for the death or injury of an animal that it should be actually touched by the engine or cars of the train. The decisions turn upon the language of the enactment, which import the idea of actual collision or contact with the animal injured or killed. In such cases, whenever the owner of stock founds his claim for damages upon statutes of this sort, he is required to bring his case substantially within its terms, by alleging and proving that the stock was killed or injured by the locomotives, etc., or was done by an engine or agent, according to its provisions. Hence, under statutes of this kind, railroad companies are not liable for frightening stock by their engines or cars, even though the fright causes the animals to kill themselves. They exclude by their language any injury not occurring from actual collision with the locomotives or cars. But the inquiry is raised, whether or not the language of the statute is broad enough in its terms to include, not only injuries which are caused by direct collision, but such as might result from a moving train to any live-stock upon or near its unfenced track.

Our statute says, in brief, that a railroad company shall be liable for any stock killed or injured upon or near any unfenced



track, whenever such killing or injury is caused by a moving train upon such track. In construing this statute, it must be constantly borne in mind that there must be a want of a fence along the railroad track, which would have prevented the injury; and that where the want of a fence sustains no relation to or connection with the injury, when caused by a moving train, the statute has no application. Hence, the case suggested, intended to illustrate that if any construction be given to the statute for the death or injury of stock other than occurs by actual collision, it might be contended "if a horse running in the pasture of his owner, through which the railroad passes, and is unfenced, should take fright at a passing train, run half a mile across the field in an opposite direction from the railroad, then run into a pit dug by the owner, or against a fence built by him, or against a tree which nature put there, broke his neck and died, the railroad company would be liable for the value of the horse because the track of its railroad was unfenced," is not well taken. In such case, or cases of that sort, the want of a fence sustains no relation to or connection with the injury, and the statute has no application. When a statute imposes liability for the killing or injury of stock, caused by a moving train, upon or near its unfenced track, it includes all such causes as are produced by a moving train that directly contribute to that result, whether caused by actual collision or not, when the injury occurs upon or near its unfenced track. The words "whenever such killing or injury is caused by a moving train," etc., relate to injuries directly caused by it to stock upon or near its unfenced track, and are broad enough to include all injuries thus occurring, which are the direct result of such moving train upon such track. This would include injuries occurring upon its track from other causes than actual collision. The killing or injury must be caused by a moving train; but it is immaterial whether such killing or injury is the result of actual collision or not, so that it is caused, for the want of a fence, by a moving train, upon or near its track.

It is enough if the injury which results is caused by a moving train, when the lack of a fence permitted the animal to get on the track. This construction is further sustained by the use of the words "near any unfenced track," which indicate a place where the death or injury to the animal may happen without actual contact with the engine, yet be caused by it. Hence, a moving train may be the cause of the injury or death

of an animal without actual collision. To illustrate: For the want of a fence along the track of a railroad where it ought to be fenced, an animal enters upon the track, and while there takes fright at an approaching or moving train, and to escape the danger, runs along the track and falls into a trestle, or jumps into a ditch near the track and is injured. Is not the injury caused by a moving train? It caused the animal to take fright, and in its flight to run into the trestle or jump into the ditch and injure itself. From the cause of the fright to the injury there is no break nor intervening agency. The moving train was the cause of the injury, and without it the injury would not have occurred. Under our statute, then, it is sufficient, if the moving train caused the injury, in connection with an omission to fence, whether there was actual collision or not. Under statutes of other states, where the language of the enactment did not necessarily import that there must be actual collision to give a right of recovery, their courts have held that it is not necessary that there shall be a collision to entitle the owner of the injured animal to recover.

In *Young v. St. Louis etc. R'y Co.*, 44 Iowa, 173, a horse went upon the defendant's track, which was not fenced, before a train, and ran ahead of the train until it fell into a bridge and received injuries from which it died. There was but a single narrow passage down the fill of the road, affording an avenue of escape between the point where the horse went upon the track and the bridge. The train was stopped before it reached the horse. The statute of Iowa imposes upon railroad companies liability for stock injured upon their roads when unfenced at points where the duty to fence exists, when the injury results by reason of want of a fence, and is not occasioned by the willful act of the owner. Under this statute, and upon the facts as stated, the railroad company was held liable. The court said: "When, then, may it be said that an animal is injured by reason of a want of a fence, within the meaning of the statute?" The answer was: "It is when the want of a fence, in connection with the acts of the defendant, is the proximate cause of the injury."

In *Kraus v. B. C. R. & N. R'y Co.*, 55 Iowa, 338, the mare got on the track by reason of a want of a fence, and being frightened by a train, ran along the track in front of it until she came to a bridge forming a part of the road, in attempting to cross which she was greatly injured, without having been struck by the train; and the court held that it was not neces-

sary that the mare should have been struck by the train to authorize a recovery under the statute. In this case the defendant asked the court to instruct the jury, that "if the railroad run through a plat of country from the point where the mare in question came upon the track, and could have escaped from the track just as well as not, but instead of doing so she ran along upon the track, jumped into the bridge and was injured without collision with the locomotive or railroad train drawn by it, then there can be no recovery in this action." The court says: "We are not prepared to say the defendant can escape a result caused by its negligence in failing to fence, by setting up a want of intelligence, or the negligence of the animal injured; nor are we prepared to say, as a matter of law, that the plaintiff cannot recover if the facts were as stated in the instruction refused."

In *Liston v. Central etc. R'y Co.*, 70 Iowa, 714, it was claimed that the horse was not killed by reason of the absence of a fence at the place of accident, because there was nothing to prevent him from leaving the track; but the court held, although a horse may be crazy if he get upon the track of a railroad on account of a want of a fence, where the duty to fence exists, and for want of intelligence, runs ahead of the engine on the track, when he might escape on either side, and runs into a bridge and is killed, without being struck by the engine, the company is liable, notwithstanding the horse's want of intelligence and the manner of his death.

In *Atchison etc. R. R. Co. v. Jones*, 20 Kan. 529, a mare got on the track at a place where it ought to have been but was not fenced, and being frightened at an approaching train, fled along the track until she reached a tie-bridge, where she either jumped forward, or was thrown forward by the engine onto the bridge, and was fatally injured. The statute of Kansas imposes liability for every animal killed or wounded "by the engine or cars on such railway, or in any other manner whatever in operating such railway," etc., where there is an omission to fence. The court held that under the statute no actual collision between the engine and the animal injured is essential to liability. Brewer, J., speaking for the court, said: "This last clause is very broad, and clearly covers a case like the present. Whether the engine struck the mare or not, the injury resulted directly from the operating of the railway. Of course, the mere fact that she was injured on the track would not be conclusive. . . . But where the injury

occurs in the actual operating of the railway, and as the direct result of such operating, then the statute applies. Here the company was running one of its trains; an animal is on the track, permitted to come on through the lack of a fence along the track at a place where it ought to be fenced; the approaching train frightens it, and it flees along the track to avoid danger, and in that flight either falls or is thrown by engine into the open space of a tie-bridge and is injured. Clearly, the train, acting upon the animal's sense of fear, and the open space of the bridge, are the direct causes of the injury. It results from and occurs in operating the road."

In all these cases the fact that the train did not strike the animal does not relieve the railroad company from liability; but in all of them the fence bears a relation to the injury in connection with the operation of the train as the proximate cause. Sections 4044 and 4048, Hill's Code, when taken together, provide, in effect, that a railroad company shall be liable for the value of stock killed, and for reasonable damages when injured upon or near any unfenced track of its road, whenever such killing or injury is caused by any moving train, engine, or cars upon such track; and (4048) that in every action for the recovery of such value for stock so killed, or for damages for such injury to the same, the proof of the killing or injury shall of itself be deemed and held conclusive evidence of negligence on the part of the company; but contributory negligence on the part of the plaintiff in such action may be set up as a defense. "The statute," says Thayer, C. J., "makes the killing or injury of stock in such case conclusive evidence of negligence upon the part of the railroad company, and I do not see that it is necessary for the plaintiff to allege negligence in any form": *Hindman v. Oregon R'y & Nav. Co.*, 17 Or. 620.

We do not understand, then, in actions brought under the statute, that it is material whether the servants of the company operated the train carefully when there is an omission to fence, by reason of which stock get on the track, and the injuries to them which result therefrom, upon or near its track, are caused by a moving train. For this reason we have assumed that there was no negligence of the servants of the defendants in the operation of the train, although the evidence indicates that there were but two places where the animals could have left the track without some difficulty or danger. So that under our statute, when the killing or injury of stock

is caused by a moving train at a place where the company has failed to fence, where the duty to fence existed, and the facts are so alleged and proved, a case of negligence is made out, unless the defendant can show contributory negligence or misconduct.

In the case at bar the mare got on the track for the want of a fence where the duty to fence existed, and frightened at an approaching train, fled down the track to escape the danger, and in that flight ran into an open trestle and was injured. It was the want of a fence along the track at a place where it ought to have been fenced that permitted the mare to get on the track; and the injury which resulted to her therefrom was directly caused by a moving train. The want of a fence, therefore, in connection with the moving train, was the proximate cause of the injury, and rendered the company liable, under the terms of the statute, without actual collision.

In this view we do not think there was any error, and the judgment of the court below must be affirmed.

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**RAILROADS — LIABILITY FOR INJURY TO ANIMALS ON UNFENCED TRACK.** — A railroad must erect and maintain fences required by the statute, and its liability is absolute for damages from its failure to do so: *Brown v. Milcombes etc. R'y Co.*, 21 Wis. 39; 91 Am. Dec. 456. And this is true whether the company was guilty of negligence or not: *St. Louis etc. R. R. Co. v. Linder*, 39 Ill. 433; 89 Am. Dec. 319; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; 72 Am. Dec. 220, and note; *Gulf etc. R'y Co. v. Hudson*, 77 Tex. 494; *Congdon v. Central Vermont R'y Co.*, 56 Vt. 390; 43 Am. Rep. 793; *Kaiser v. New York etc. R. R. Co.*, 126 N. Y. 365; see note to *Missouri Pac. R'y Co. v. Godney*, 21 Am. St. Rep. 289.

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## DOERNBECHER v. COLUMBIA CITY LUMBER Co.

[21 OREGON, 572.]

**CORPORATIONS — NOTICE OF MEETINGS — TRANSACTIONS OF ILLEGAL MEETING AS EVIDENCE.** — It is indispensable, to a legal meeting of the directors of a corporation for the transaction of business, that all the directors have notice, either actual or constructive, of the time and place of the meeting, unless they are all actually present thereat. The transactions of any meeting not so held are void, and evidence of such transactions are inadmissible upon a direct attack.

**CORPORATIONS — NOTICE OF MEETING.** — AN ASSIGNMENT of the property of a corporation, made by a majority of its directors, at a meeting held without notice, actual or constructive, to all the directors of the time and place of such meeting, and in the absence of some of the directors, is void.

*A. C. Emmons and C. J. McDougall*, for the appellant.

*R. and E. B. Williams, and J. M. Bower*, for the respondent.

BEAN, J. This is a suit by a judgment creditor of the insolvent defendant corporation, to enforce the individual liability of defendants Dunbar, Wallace, and Plimpton, stockholders, for their stock subscribed and unpaid. It is sufficient to say that the complaint is in the usual form, and the answer avers a general assignment by the corporation, prior to the commencement of this suit, of all its property for the benefit of creditors, and the sole right of the assignee to collect all moneys due for stock subscribed and unpaid. The validity of this assignment is the only question necessary to consider in this case.

The defendant corporation was organized in 1883 by the election of defendants Dunbar and Wallace, and D. W. Council, C. J. McDougall, and William Lowe, directors, Dunbar being president, McDougall secretary, and Lowe treasurer, and there had been no change in the officers since the organization of the company. No resolution or by-law was ever adopted providing for the time or place of meeting of the directors, nor does any record of the proceedings of the board seem to have ever been made or kept. The custom was to hold the meetings of the board for the transaction of business at such times as the necessities of the business required and the convenience of the members permitted.

The company being largely indebted to William Lowe prior to the fourteenth day of May, 1889, Lowe assigned his claim to plaintiff, who on that day duly commenced an action against the company to recover the amount due thereon, which finally resulted in a judgment in plaintiff's favor. After the commencement of this action, and before final judgment, directors Dunbar, Wallace, and McDougall, without any notice to the other directors, assembled by mutual consent at the office of Emmons and Emmons, in the city of Portland, and pretended to pass a resolution authorizing the president and secretary of the company to assign all its property to R. W. Emmons, for the benefit of its creditors, after which a deed of assignment was executed in due form. It is claimed by plaintiff that the proceedings of this meeting are illegal and void, because it was convened without notice, verbal or written, to the directors who did not attend; and in this we think he is abundantly supported both by reason and authority.

It is indispensable to a legal meeting of the directors of a

corporation for the transaction of business that all the directors have notice, actual or constructive, of the time and place of the meetings. Otherwise, it might happen that a bare majority of the quorum present, being a minority of the whole, would do some act contrary and in opposition to the will of the majority. The stockholders and other persons interested in the corporation are entitled to the combined wisdom of all the directors. Where the time and place has not been fixed by some other competent authority, such meetings must be called by personal notice to each member of the board of directors. "It is not only a plain dictate of reason," says Mr. Justice Cowan, "but a general rule of law, that no power or function intrusted to a body consisting of a number of persons can be legally exercised without notice to all the members composing such body": *People v. Batchelor*, 22 N. Y. 134. And this is so for the transaction of even ordinary business.

But here an extraordinary act was to be performed, — the assignment and transfer of all the property of the corporation, —and there was, therefore, the greater reason that all the directors should be informed of the meeting, so that their advice and counsel might be had before this important step was taken. The board consisted of five members, a bare majority of whom assembled to perform the act, and dispose of the property of the company. In such case it might happen, if no more were notified, that two of the five directors would perform it, although against the will of the remaining three. To prevent such a possibility, it is necessary that all be notified. It is no excuse to say that the three who were present all voted for the resolution, and had the other two been present the result would have been the same. The right to deliberate, and by their advice and counsel convince their associates, if possible, is the right of the minority, of which they cannot be deprived by the arbitrary will of the majority: *Commonwealth v. Cullen*, 18 Pa. St. 138; 53 Am. Dec. 450.

All persons interested in the corporation are entitled to the advice and influence as well as the votes of all the directors. And, says Mr. Morawetz, "while it may not be the duty of every director to be present at every meeting of the board, yet it is certainly the intention of the share-holders that every director shall have a right to be present at every meeting, in order to acquire full information concerning to the affairs of the corporation, and to give the other directors the benefit of his judgment and advice. If meetings could be held by a bare

quorum without notifying the other directors, the majority might virtually exclude the minority from all participation in the management of the company": Morawetz on Corporations, sec. 532.

Where the meeting is a general or stated one, provided for in some resolution or by-law, notice of the time and place of the meeting is, perhaps, in the absence of a different provision in the charter or by-laws of the company, not necessary: *State v. Bonnell*, 35 Ohio St. 10; *People v. Batchelor*, 22 N. Y. 134; *Merritt v. Farriss*, 22 Ill. 303; *Warner v. Mower*, 11 Vt. 385. In such case each member is presumed to have notice of the day fixed for the meeting. But if the meeting be a special one, personal notice, if practicable, is necessary to each member, unless all are present and participate in the proceedings. And such notice is essential to the power of the board to do any act which will bind the corporation, and without such notice, or the presence of all the directors, its acts are void. This is the general rule under all the authorities; the few cases of dissent, or apparent dissent, *Bank v. Flour Co.*, 41 Ohio St. 552, *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207, being borne down by the great weight of authority: Beach on Private Corporations, sec. 279; *Commonwealth v. Cullen*, 13 Pa. St. 133; 53 Am. Dec. 450; *State v. Furgeson*, 31 N. J. L. 107; *Harding v. Vandewater*, 40 Cal. 77; *Gordon v. Preston*, 1 Watts, 385; 26 Am. Dec. 75; *People v. Batchelor*, 22 N. Y. 128; *Pike Co. v. Rowland*, 94 Pa. St. 238; *People's etc. Ins. Co. v. Westcott*, 14 Gray, 440; *Covert v. Rogers*, 38 Mich. 363; 31 Am. Rep. 319; *Doyle v. Mizner*, 42 Mich. 332; *Baldwin v. Canfield*, 28 Minn. 43; *D'Arcy v. R'y Co.*, L. R. 2 Ex. 158; *Stow v. Wyse*, 7 Conn. 214; 18 Am. Dec. 99, and note; Angell and Ames on Corporations, sec. 488; Green's Brice on Ultra Vires, 438; Field's Lawyers' Briefs, sec. 205; *In re St. Helens M. Co.*, 3 Saw. 88.

The provisions of the statute, that the powers vested in the directors may be exercised by a majority of them (Hill's Code, sec. 3227) does not change the rule, or render it any the less necessary that the other members should have notice of the meeting: *Harding v. Vandewater*, 40 Cal. 77. It presupposes a legally authorized meeting. When the meeting is a regular one, or if special, called with notice to each director, then if a majority be present, they may legally exercise the powers vested in the directors, otherwise not. It is not pretended



that there was any notice, actual or constructive, to directors Lowe and Council, of the meeting at which the assignment was authorized, nor does there appear to have been any excuse for not notifying them. Lowe's place of business was but a short distance from the place of the meeting, and Council resided at Columbia City, a few miles below Portland. In fact, it would seem from the evidence that the omission to notify Lowe, at least, was intentional, because it was thought he would oppose the assignment.

This case then does not come within the exception to the rule requiring actual notice, as held by some of the courts, when the absent director is out of the state or inaccessible: *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64. The fact that Lowe was and is the person beneficially interested in the judgment of plaintiff, and therefore the principal creditor of the company, furnished no excuse for not notifying him of the proposed meeting of the directors, the object of which was to place the property of the company beyond the reach of an execution issued on any judgment plaintiff might recover, and to prevent him from enforcing the individual liability of the stockholders. He was a director and stockholder, and as such had a right, if he desired, to be present and participate in the proceedings of a meeting of such vital importance to the company as well as himself. We are, therefore, clearly of the opinion that the action of the board authorizing the assignment is void for the want of notice to the directors who did not attend.

It was urged at the argument that plaintiff could not in this suit question the validity of this assignment because this is in the nature of a collateral attack. It is clear that the creditors, as well as the stockholders, can impeach the transfer of property by the corporation for want of previous action of the board of directors, but it is sometimes said this cannot be done collaterally, but only by a direct proceeding brought for that purpose: *Eno v. Crooke*, 10 N. Y. 60; *Castle v. Lewis*, 78 N. Y. 131. But on this record it can hardly be said that this is a collateral attack within the meaning of this rule. Defendants rely solely upon this assignment as a defense to this suit. The plaintiff, therefore, has a right to insist that the proof on their behalf shall show an assignment on its face apparently valid, and this it fails to do, because it affirmatively appears it was not authorized at a legal meeting of the directors.

Hence this is simply a failure of proof, and the defense is not made out.

The decree of the court below is therefore affirmed.

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**NECESSITY OF NOTICE TO DIRECTORS TO ATTEND MEETINGS:** See *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64, and cases cited in note. Under the Civil Code of California, each director must have special notice of the regular meetings of the board, unless provision is made in the by-laws for such meetings; *Thompson v. Williams*, 76 Cal. 153; 9 Am. St. Rep. 187. Since a majority of a bare quorum of the board of directors may bind the corporation (*Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516), it follows that an assignment for the benefit of creditors, made by a majority of the directors of a corporation, constituting a legal quorum, is not invalid because two of the directors, being out of the state at the time, failed to receive actual notice of the meeting; *Chase v. Tuttle*, 55 Conn. 455; 3 Am. St. Rep. 64. See, further, note to *Stow v. Wyse*, 18 Am. Dec. 103, as to the validity of acts done at meeting not properly called.

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## WORLEY v. TAYLOR.

[21 OREGON, 589.]

**WILLS CREATING POWER OF EXECUTOR TO SELL.** — A will merely charging lands with specific debts does not give the executor power to sell to enforce the charge, but the lands descend to the heir or devisee, subject thereto.

**WILLS — EFFECT OF SALE UNDER, AS AGAINST PRETERMITTED HEIR.** — A child living at the time of the death of the testator, and not named or provided for in his will, takes against and notwithstanding such will, the same as if the testator had died intestate; and a sale of land by the executor under such will does not divest the interest of the child in the property sold.

*J. C. Fullerton, G. W. Colvig, and E. B. Preble*, for the appellant.

*Lane and Lane, and W. R. Willis*, for the respondents.

**LORD, J.** This is a suit in equity, brought by the plaintiff against H. M. Bland, defendant, and others, to quiet title to certain land described in the complaint. In substance, the facts alleged are these: On the twenty-sixth day of November, 1879, the plaintiff purchased the land in question from one Lewis Chapman, and has been in the possession of the same ever since. On the twenty-first day of July, 1879, the said L. Chapman purchased the same from Mary E. Bland, now Mary E. Taylor, who was the widow of Henry Bland, for

the consideration of three thousand five hundred dollars. The other defendants, except Charles Taylor, are the children and heirs at law of said Henry Bland, deceased, who, on the sixth day of August, 1873, was the owner of said premises, and made his will whereby he devised and bequeathed all his real and personal property as follows: To Mary E. Bland, all his real property after payment of all his just debts; and to each of his six children therein named, the sum of twenty-five dollars. Mary E. Bland was nominated executrix of said will. Henry Bland died on the twenty-fifth day of September, 1874, but after the making and execution of said will, and before the death of said testator, a son, Henry M. Bland, one of the defendants herein, was born. The said will was duly admitted to probate, and thereafter, on the twelfth day of April, 1875, the said Mary E. Taylor, then Mary E. Bland, was duly appointed and afterwards duly qualified as executrix. On the third day of May, 1875, said executrix filed in the county court an inventory and appraisement of all the property belonging to the said estate, and on the thirty-first day of March, 1880, the said executrix filed in said court her final account in settlement of said estate, from which final account it appeared that the sum of all the debts presented to and allowed and paid by her as such executrix against said estate, together with the expenses of the administration thereof, equaled the sum derived by said executrix from the sale of all personal and real property belonging to said estate. On the sixth day of July, 1880, the said court, by order duly made, accepted the said final account and confirmed the same in all things, and by said order released said executrix and her bondsmen from all further liabilities in said matter. The said real property sold and conveyed by the defendant Mary E. Taylor to the said Lewis Chapman, as aforesaid, was worth no more than the sum paid therefor by the said Chapman to the said defendant. It was sold for the sole purpose of settling the debts as aforesaid, and was applied by her as such executrix in the payment of said debts; and all the property belonging to said estate was sold and the proceeds applied to the payment of the just debts of said testator, and none of the heirs named in said will ever received anything by virtue of the provisions thereof. The defendant Henry M. Bland claims some interest in the said real property adverse to said plaintiff, for the reason that said defendant was not named in the will of his father, the said Henry Bland, deceased, the nature and extent of which

is unknown. The other defendants claim adversely to plaintiff, etc., and said claim of defendants is without right. The complaint prays that the plaintiff be decreed to have a good and valid title, and that the defendants be debarred from asserting any claim adverse to the plaintiff.

The answer of the defendant Henry M. Bland by his guardian *ad litem* is to the effect that he denies that the plaintiff is the owner of the real property in question, or any part thereof more than an undivided six sevenths thereof; denies that his claim is without any right whatever, etc.; but alleges that he is the owner in fee, as heir at law of Henry Bland, deceased, of an undivided one-seventh interest of, in, and to the premises described in the complaint, and prays that he may be adjudged and decreed to be the owner of the same.

The reply put in issue all the material facts alleged in the answer. The case was argued and submitted to the trial court upon the pleadings, and the judgment rendered therein was to the effect that the plaintiff and the defendant Henry M. Bland, minor, are owners in fee-simple, as tenants in common, of the described premises, the plaintiff F. O. Worley of the undivided six sevenths thereof, and the defendant Henry M. Bland of the undivided one seventh thereof.

By the terms of the will, when the testator devised the land in dispute to his wife, then Mary E. Bland, now the defendant Mary E. Taylor, "after the payment of all his just debts," according to the prevailing doctrine of English equity jurisprudence, he created a charge by implication, though not specific, upon the land devised: 2 Story's Eq. Jur., sec. 1246; 3 Pomeroy's Eq. Jur., sec. 1247, and notes.

The contention for the plaintiff is, that when lands are so charged in the will of the testator for the payment of debts, a power to sell the lands will be implied to the executor and devisee, and therefore that the executrix and devisee of the present will had the implied power to sell the land in controversy for the payment of debts as alleged. But this doctrine of an implied power of sale has had doubts cast upon it by the case of *Doe v. Hughes*, 6 Ex. 223, in which it was held that there is no implied power in executors to sell lands, arising from a mere charge of the debts upon the land made by the will.

At common law the lands of a deceased person were not liable for his debts; nor even on specialty obligations, except when the heir was bound. "But equity," as Ruffin, J.,

said, "ever anxious to have just debts paid, strove to apply the real estate to their satisfaction, since otherwise they would remain unpaid. This was effected by holding the devisee to be a trustee for creditors, if the testator gave any intimation that such was his wish. The slightest expression was sufficient; as, 'if he talks about his debts in the beginning of his will'; for it is considered that he meant to go beyond the law in making a provision; else why not leave it to the law by being silent: *Williams v. Chitty*, 3 Ves. Jr. 545": *Dunn v. Keeling*, 2 Dev. L. 285.

It was for this reason — to effect the just purpose of paying the debts of the deceased — that equity gave to such general expressions in a will such construction and meaning. But the necessity for such construction in many jurisdictions does not now exist. The necessity, as well as the reason for it, has been superseded by statutes which make the lands of the decedent liable for the payment of all his debts. Under the provisions of our code, the real estate of every deceased person is chargeable with the payment of his just debts, funeral charges, and the expenses of administration, except that the personal estate is primarily chargeable with them, unless the deceased by his will has otherwise directed: *Hill's Code*, secs. 1142 et seq.; *Wright v. Edwards*, 10 Or. 298. Under these provisions, it makes no difference whether the decedent made a will or not, or what provisions it contains; the real estate is liable whenever it is required for the payment of debts; but when the estate is more than sufficient to pay all debts, it is competent for the deceased to exonerate the personalty, and make his real estate primarily liable to the extent authorized by the provisions cited.

In *Smith v. Soper*, 32 Hun, 47, the court says: "There is a broad distinction between a general clause in a will for the payment of debts and one for the payment of a specified legacy or debt with respect to the application of the statutes. The clause in question in this will simply provides for what the law required if there had been no such clause, to wit, that the debts should be a charge upon the property of the testator."

In *Cornish v. Nelson*, 6 Gill, 299, it was held that since the act of 1785 the insertion of the words "and after my debts and funeral charges are paid" in a will are immaterial and inoperative; that the act renders the real estate in aid of the insufficient personalty equally liable for the payment of debts, whether the words be contained in the will or not, or whether

the deceased died testate or intestate, and that they are now of almost unmeaning form and rarely of any import.

In *In re Will of Fox*, 52 N. Y. 530, 11 Am. Rep. 751, Andrews, J., said for the court: "The statute in this state has provided an ample remedy for creditors for the collection of their debts out of the real property of a decedent, and the implication of a power of sale in executors, from a simple charge of the debts upon the land, is unnecessary and ought not to be indulged."

In these cases, and others which might be cited, the words in a will, "after the payment of my debts," are considered not to have any import or effect beyond the statutory charge, and are only co-extensive with it. While the doctrine of charging lands by implication from such general expressions has been adopted in some jurisdictions in this country, it has not been without some modification. Many of them will not hold that the intent to charge the estate is implied from such general expressions, but only when the intent to create the charge is clear and certain. Mr. Perry says: "In the United States, both real and personal property are liable for the debts of a deceased person; and no valid trust can be created by will for the payment of debts in either personal or real estate to the injury of the right of creditors. The statutes of the several states point out how estates shall be administered for the payment of debts. Creditors in all cases have the right to demand payment according to the provisions of the statute. Thus trusts, charges, or other directions in wills for the payment of debts have no legal operation so far as creditors are concerned": 2 Perry on Trusts, sec. 559.

In the case at bar there is no direction in the will that the land should be sold, or any express powers conferred upon the executrix to sell it; nor is there any intent to create a specific charge upon the land, or other than a general charge by implications from the words "after the payment of my just debts," which, as we have seen, in many jurisdictions will not be indulged; and in such case, and in view of our statutes and the authorities, it seems to us to be the better doctrine to hold that there is no implied power to executors to sell lands, arising from a mere charge of debts upon them made by the will. "The mere charging lands with specific debts," says Mr. Croswell, "does not give the executor this power of sale, but the lands descend to the heir or devisee subject to the charge, and the executor has no power to sell the land to enforce the charge": Croswell on Executors and Administrators,

sec. 331. As a consequence of these views, no such power can be applied to sustain the sale of the land in controversy, as against the minor defendant Henry M. Bland.

But even if this point were doubtful, or however this may be, there is another objection to the contention for the plaintiff which is fatal to his claim. This is as to the legal rights of the defendant Henry M. Bland to his share of the real property devised, as affected by the statute. He was not named or provided for in the will, nor was there any provision in the will for the sale of the land by the executrix. The sale by her to Chapman was private, and not under the provisions of the statute. The inquiry then is, Could the sale of the land in controversy by the executrix convey the interest therein of the minor Henry M. Bland, who was born after the making of the will and before the death of the testator, and who was not named or provided for in it. Section 3075, Hill's Code, provides as follows: "If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as shall regard such child or children, or their descendants not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." This section has received a construction by this court which is decisive of the rights of the minor defendant not named or provided for in the will. In *Northrop v. Marquam*, 16 Or. 186, Hettie Northrop was born after the making of her father's will; she was not named or provided for in the will, and her father died about eight months before her birth. Strahan, J., said: "As to Hettie's interest in her father's estate, he is deemed to have died intestate. While the will is valid and effectual as to all the children named or provided for therein, it is no will as to those not named or provided for, and any such child will take under the law of descent in all respects as if no will had been made. Hettie, therefore, though *in ventre sa mere* at the time of her father's death, took by inheritance one fourth of all the real property of which he died seised in this state." And in reply to the claim that

Hettie's interest was divested by the sale by the executor, and that she was compelled to accept her proportion of its proceeds upon the doctrine of equitable conversion, as applicable to the interest of a child not named or provided for in the will, he said: "By the terms of the statute there is no will as to such child; it is a case of intestacy, and to hold that the estate which comes to him by inheritance in such case could be in any manner affected by the will would be in effect to disregard the plain provisions of the statute."

In construing a statute of similar import in *Smith v. Robert, son*, 24 Hun, 213, wherein Carrie B. Scott, a child, was unprovided for by any settlement, and neither provided for nor in any way mentioned in the will of her father, the court says: "She stands, therefore, under the protection of this statute, which intended to provide for all persons similarly situated. Under it she must succeed to the same portion of her father's real estate as would have descended to her if he had died intestate. This is strong, emphatic language, and must receive satisfaction, which can only be given to it in full by allowing her to recover the land."

Upon appeal, *Smith v. Robertson*, 89 N. Y. 558, Rapallo, J., in delivering the unanimous judgment of the court in affirmance, said: "We are of the opinion that on the death of John J. Scott, the testator, the real estate in controversy descended to his infant daughter, under the provision of 2 Rev. Stats. 65, sec. 49, in the same manner as it would have descended if the father had died intestate, and the infant does not take under the will or subject to any of its provisions. The statute, instead of declaring the entire will revoked by the subsequent birth of issue for whom no provision is made, renders it inoperative as to that portion of the testator's estate which if he had died intestate would have descended or been distributed to after-born children. . . . The remedies given by statute against devisees, to recover a portion of the property where only a portion descends to an after-born child, do not operate to subject the estate of such child to a power of sale contained in the will, or to confine his remedies to a pursuit of the proceeds of the sale. He is entitled by the plain terms of the statute to recover the same portion of the *corpus* of the estate which he would have been entitled to had his father died intestate."

Nothing, it would seem, could be added to make more plain



the true spirit and meaning of the statute. The child not named or provided for in the will takes by virtue of the statute and against and notwithstanding the will. As to its interest in the realty, the father has died intestate, and the title instantly descends to such child as heir. When Henry Bland, the testator, died, the statute operated so as to vest his title in his child, Henry M. Bland, to its proportional share of his realty; and on the instant of his demise such child became absolutely seised of its proportion of the real property in controversy. He took by inheritance that proportion of the realty to which he was entitled unaffected by the will, whether it contained any power of sale, expressly or by implication. As a consequence, he could not be divested of his title by the alleged sale. But whether or not under such sale, where the money paid by the purchaser was applied to the payment of debts against the estate, such purchaser is entitled to be subrogated to the rights of the original holders of such claims to be charged as a lien upon the land, so as to affect the interest therein of the defendant Henry M. Bland, we do not deem it necessary for us to consider, because it is not within the purview of the pleadings.

From these views, it results that there was no error, and that the decree must be affirmed.

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**SALE BY EXECUTOR WITHOUT ORDER OF COURT**, under a will containing no power to sell, is void: *Huss v. Den*, 85 Cal. 320; 20 Am. St. Rep. 232. Where no express power is given to executors to sell lands, power to sell will not be implied from the mere charge of the debts upon the land: *Will of Fox*, 52 N. Y. 530; 11 Am. Rep. 751.

**LANDS OF A DECEDENT** are taken subject to the payment of his debts, whether they pass to devisees: *Smith v. Seaton*, 117 Pa. St. 382; 2 Am. St. Rep. 668; or to heirs: *Garibaldi v. Jones*, 48 Ark. 230. Any sale by the recipients of such real estate would leave the land subject to administration for the payment of debts: *Johnson v. Johnson*, 80 Ga. 260. But in order to subject lands in the hands of heirs or devisees to the payment of testator's debts, resort must be had to the statutory provisions regulating such cases: *Priest v. Spier*, 96 Mo. 111; and the validity of the proceedings depend upon a substantial compliance with the law: *Richardson v. Butler*, 82 Cal. 174; 16 Am. St. Rep. 101.

**PRETERMITTED HEIRS.** — As to the interest of a pretermitted heir, his ancestor must be regarded as dying intestate: *Smith v. Olmstead*, 88 Cal. 582; 22 Am. St. Rep. 336. The intent to disinherit a child must appear from the words of the will: *Estate of Stevens*, 83 Cal. 322; 17 Am. St. Rep. 252; *Estate of Jacobs*, 140 Pa. St. 268; 23 Am. St. Rep. 230, and note. A power of sale in a will, and a sale thereunder, though confirmed by the court, do not affect

the share of a pretermitted heir, unless the sale was made to pay decedent's debts, or charges accruing in the course of administration: *Smith v. Olmstead*, 88 Cal. 582; 23 Am. St. Rep. 336.

REVOCATION OF WILL BY BIRTH OF CHILD: See *Negus v. Negus*, 46 Iowa, 487; 26 Am. Rep. 157; and *Fallon v. Chidester*, 46 Iowa, 563; 26 Am. Rep. 164, and note. In *Young's Appeal*, 39 Pa. St. 115, 80 Am. Dec. 513, it was held that the will of a married woman was revoked, but only so far, under the statutes of Pennsylvania, as the child would have taken without the will.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**RAPP v. CRAWFORD.**

[146 PENNSYLVANIA STATE, 21.]

**ESTOPPEL**—OWNER OF JUDGMENT ESTOPPED FROM DENYING DEFENDANT'S TITLE TO PROPERTY SOLD UNDER EXECUTION ISSUED ON. — Where the real owner of a judgment rendered in the name of another as the plaintiff on the record has execution issued and property sold under it as the property of the judgment defendant, he will be thereby estopped from afterwards setting up that such defendant had no title to the property when it was sold.

**ACTION** against a sheriff. An appeal was entered to the common pleas of Venango County, from the judgment of a justice of the peace in favor of the plaintiffs against the defendant, the sheriff of Venango County. The defendant pleaded not guilty. At the trial the case presented by the testimony was in substance as follows: In March, 1888, James Meehan leased a boiler to James N. Wilson, or sold it with the condition that the title should remain in Meehan until a certain sum should be paid in rentals. Subsequently Wilson wished to sell the boiler, and on the 24th of March, 1888, he and Meehan went to a bank, where Wilson paid Meehan \$50 in cash, and gave his note for the balance of \$195 due on the boiler. The note was made to the bank, and was signed by Meehan as surety. It was discounted by the bank, and the proceeds were paid to Meehan. Meehan thereupon gave a receipt for the money and note in full for the boiler. The note contained a warrant of attorney to confess judgment, and judgment was entered on it on June 23, 1888. On March 30, 1888, the plaintiffs, Rapp and Brandon, after inquiring of Meehan, and

being told that he had sold the boiler to Wilson, bought the boiler from Wilson and paid for it, Wilson at the time showing the receipt above mentioned. Meehan afterwards paid the note to the bank, but at what time does not appear. At all events, an execution was issued on the judgment entered on the 23d of June, 1888, the boiler was levied upon, and on the 21st of July, 1888, Meehan bought it in at the sheriff's sale for seventeen dollars. The defense was made that when the money and note were delivered to Meehan and the receipt to Wilson, there was a contemporaneous parol agreement that the title to the boiler was still to remain in Meehan until the note was paid by Wilson, of which agreement the plaintiffs herein had notice. In support of this allegation, the defendant offered to prove by Blakeley, the cashier of the bank, who was present at the time that Brandon, one of the plaintiffs, came to the bank a few days after the transaction referred to, inquired whether Wilson could sell the boiler or not, and was told of said condition, that Wilson could not sell the boiler until he paid the note, and was warned not to buy it. The offers, being objected to, were refused, and exceptions taken. The jury returned a verdict for the plaintiffs for \$201.25, and judgment having been entered, the defendant appealed.

*W. J. Breene*, for the appellant.

*J. S. Carmichael and R. W. Dunn*, for the appellees.

STERRETT, J. The appellant practically concedes that the levy made by virtue of the execution on the judgment against J. N. Wilson implied an assertion by plaintiff that the title to the property levied was in the defendant. The sole purpose for which it could have been used was the collection of the judgment, and its issuance would have been vain and useless without title in the defendant. The implication is so much the stronger when the plaintiff was the vendor, and the levy is made for the purpose of enforcing the collection of the purchase-money of the property levied upon; his levy is upon a full knowledge of the facts.

It is obviously immaterial that James Meehan was not named as plaintiff on the record. If he was the real owner of the judgment, the levy was his act and for his benefit, and he is thereby estopped from denying that the title to the property levied upon was in Wilson or those claiming under him. That he was the real owner was testified by the nominal plaintiff

and was uncontradicted. The rulings of the court were therefore right, and the judgment should not be disturbed.

Judgment affirmed.

**ESTOPPEL.** — A judgment creditor is not estopped to deny his debtor's title to property sold under execution to satisfy his judgment: *Martin v. Zellerbach*, 38 Cal. 300; 99 Am. Dec. 365, and note. K. attached the defendant's land, against which there was a mortgage of record. Subsequently a judgment was rendered in his favor and a sale was ordered. The appraisers in appraising the defendant's interest in the land recognised the mortgage as a valid lien. At the sale the land was purchased by the plaintiff, subject to all liens thereon, the mortgage was afterwards assigned, and in an action to foreclose it was held that the plaintiff was estopped to deny the validity of the mortgage: *Koch v. Losch*, 31 Neb. 625.

## COMMONWEALTH v. RANDOLPH.

[146 PENNSYLVANIA STATE, 52.]

**SOLICITATION TO COMMIT FELONY IS INDICTABLE OFFENSE AT COMMON LAW.** — The solicitation to commit murder, accompanied by an offer of money as a reward for its commission, is an indictable offense at common law.

**INDICTMENT.** The opinion states the case.

*B. A. Winternitz and John G. McConahy*, for the appellant.

*D. B. Kurtz, A. L. Porter, district attorney, Malcolm McConnell, and L. T. Kurtz*, for the commonwealth.

**PER CURIAM.** The appellant was convicted in the court below upon an indictment in the first count of which it was charged that she, "Sarah A. McGinty, *alias* Sarah A. Randolph, . . . unlawfully, wickedly, and maliciously did solicit and invite one Samuel Kissinger, then and there being, and by the offer and promise of payment to said Samuel Kissinger of a large sum of money, to wit, one thousand dollars, which to him, the said Samuel Kissinger, she, the said Sarah A. McGinty, *alias* Sarah A. Randolph, then and there did propose, offer, promise, and agree to pay, did incite and encourage him, the said Samuel Kissinger, one William S. Foltz, a citizen of said county, in the peace of said commonwealth, feloniously to kill, murder, and slay, contrary to the form of the act of general assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania." Upon the trial below, the defendant moved to quash the in-

dictment upon the ground that "the said indictment does not charge in any count thereof any offense, either at common law or by statute." The court below refused to quash the indictment, and this ruling, with the refusal of the court to arrest the judgment, is assigned as error.

It may be conceded that there is no statute which meets this case, and if the crime charged is not an offense at common law, the judgment must be reversed.

What is a common-law offense? We endeavored to answer this question in *Commonwealth v. McHale*, 97 Pa. St. 397, 39 Am. Rep. 808, in which we held that offenses against the purity and fairness of elections were crimes at common law, and indictable as such. We there said: "We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is, not whether precedents can be found in the books, but whether they injuriously affect the public police and economy." Tested by this rule, we have no doubt that the solicitation to commit murder, accompanied by the offer of money for that purpose, is an offense at common law.

It may be conceded that the mere intent to commit a crime, where such intent is undisclosed and nothing done in pursuance of it, is not the subject of an indictment. But there was something more than an undisclosed intent in this case. There was the direct solicitation to commit a murder, and an offer of money as a reward for its commission. This was an act done, a step in the direction of the crime; and had the act been perpetrated, the defendant would have been liable to punishment as an accessory to the murder. It needs no argument to show that such an act affects the public police and economy in a serious manner.

Authorities in this state are very meager. *Smith v. Commonwealth*, 54 Pa. St. 209, 93 Am. Dec. 686, decided that solicitation to commit fornication and adultery is not indictable. But fornication and adultery are mere misdemeanors by our law, whereas murder is a capital felony. *Stabler v. Commonwealth*, 95 Pa. St. 318, 40 Am. Rep. 653, decided that the mere delivery of poison to a person, and soliciting him to place it in the spring of a certain party, is not "an attempt to administer poison," within the meaning of the eighty-second section of the act of March 31, 1860 (P. L. 403). In that case, however, the sixth count of the indictment charged that the defendant did "falsely and wickedly solicit and invite one John

Neyer, a servant of the said Richard S. Waring, to administer a certain poison and noxious and dangerous substance, commonly called Paris green, to the said Richard F. Waring, and divers other persons whose names are to the said inquest unknown, of the family of the said Richard F. Waring," etc. The defendant was convicted upon this count, and while the judgment was reversed upon the first count, charging "an attempt to administer poison," we sustained the conviction upon the sixth count, Mercur, J., saying: "The conduct of the plaintiff in error, as testified to by the witness, undoubtedly shows an offense for which an indictment will lie without any further act having been committed. He was rightly convicted, therefore, on the sixth count."

The authorities in England are very full upon this point. The leading case is *Rex v. Higgins*, 2 East, 5. It is very similar to the case at bar, and it was squarely held that solicitation to commit a felony is a misdemeanor, and indictable at common law. In that case it was said by Lord Kenyon, C. J.: "But it is argued that a mere intent to commit evil is not indictable without an act done; but is there not an act done, when it is charged that the defendant solicited another to commit a felony? The solicitation is an act; and the answer given at the bar is decisive that it would be sufficient to constitute an overt act of high treason." We are not unmindful of the criticism of this case by Chief Justice Woodward, in *Smith v. Commonwealth*, 54 Pa. St. 209, 93 Am. Dec. 686, but we do not think it affects the authority of that case. The point involved in *Rex v. Higgins*, 2 East, 5, was not before the court in *Smith v. Commonwealth*, 54 Pa. St. 209, 93 Am. Dec. 686, and could not have been and was not decided. It is true, this is made a statutory offense by statute 24 & 25 Vict.; but as is said by Mr. Russell in his work on crimes (vol. 1, p. 967), in commenting on this act: "As all the crimes specified in this clause appear to be misdemeanors at common law, the effect of this clause is merely to alter the punishment of them." In other words, that statute is merely declaratory of the common law.

Our best text-books sustain the doctrine of *Rex v. Higgins*, 2 East, 5. "If the crime solicited to be committed be not perpetrated, then the adviser can only be indicted for a misdemeanor": 1 Chitty's Crim. Law, 284. See also 1 Archbold's Crim. Pr. & Pl. 19, and 1 Bishop's Crim. Law, sec. 768, where the learned author says: "The law as adjudged holds, and

has held from the beginning in all this class of cases, an indictment sufficient which simply charges that the defendant, at the time and place mentioned, falsely, wickedly, and unlawfully did solicit and incite a person named to commit the substantive offense, without any further specification of overt acts. It is vain, then, to say that mere solicitation, the mere entire thing which need be averred against a defendant as the ground for his conviction, is no offense."

We are of opinion the appellant was properly convicted, and the judgment is affirmed.

**CRIMINAL LAW — SOLICITATION TO COMMIT CRIME.** — Where death results from a felonious act of a principal, brought about by the counsels or commands of an accessory, the latter is guilty of a crime: *Sage v. State*, 127 Ind. 15. The soliciting a married woman to commit adultery is not an indictable offense: *Smith v. Commonwealth*, 54 Pa. St. 209; 93 Am. Dec. 686, and note.

## McCLINTOCK v. SOUTH PENN OIL COMPANY.

[146 PENNSYLVANIA STATE, 144.]

**RATIFICATION IN WRITING BY VENDOR OF SALE BY AGENT EQUIVALENT TO PRIOR WRITTEN AUTHORITY, WHEN.** — A contract for the sale of land, signed for the vendor by an agent not authorized by writing to sign, will, under the Pennsylvania statute of frauds, have the same force and effect, when ratified in writing by the vendor, as though signed by the agent in pursuance of lawful authority in writing, *provided* the vendee has not rescinded it before such ratification. Where, therefore, an agent of an equitable owner of land, without being thereto authorized by writing, signs for his principal an agreement to transfer to another the contract under which the principal holds the land, and subsequently the principal, at the request of the other party, executes a formal assignment written on the same sheet of paper with the agreement to transfer, and specifying the same consideration, such assignment will operate as a written ratification of the agreement executed by the agent, and take it out of the operation of the statute of frauds, notwithstanding the purchaser under the agreement refuses to accept the assignment when afterwards tendered to him.

**FORFEITURE NOT RESULTING FROM PLAINTIFF'S DEFAULT CANNOT AFFECT HIS RIGHTS.** — Where a party holding a contract for the purchase of land sells it to another, who refuses to take and pay for it, the former will not be disabled from suing in affirmance of the sale of such contract by reason of the fact that after such refusal the original contract became forfeited by the failure to pay to the vendor the money that became due under it.

**ASSUMPSIT.** The amended statement of claim averred, in substance, that on December 18, 1889, S. B. Donaldson, ad-  
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ministrator *de bonis non* of Richard Donaldson, deceased, agreed in writing, in consideration of \$150 cash in hand paid to him, to sell and convey to the plaintiff, Mattie M. McClintock, a certain tract of land containing about 211 acres at the price of \$50 per acre, payable \$1,000 on January 1, 1890, \$1,000 on delivery of the deed on or before February 1, 1890, and the balance in annual payments, to be secured by bond and mortgage. The agreement provided that time should be of the essence of the contract, and that if the \$1,000 payable January 1, 1890, should not be paid on that day, the "option" should be null and void, and the \$150 already paid should be forfeited; and that the contract should be subject to the approval of the orphans' court; that on December 23, 1889, the plaintiff, by her authorized agent, Alexander McClintock, agreed to transfer said contract to the defendant company for the consideration of \$1,150, and at the request of the defendant, the said agent indorsed thereon a receipt, which was signed as follows:—

"PITTSBURGH, PA., December 23, 1889.

"Received of the South Penn Oil Company fifty dollars of the purchase-money for the within contract. The balance to be paid by 26th, on making the necessary transfer, is to be eleven hundred dollars.

"MATTIE M. McCLINTOCK,

"By ALEX. McCLINTOCK."

That on December 26, 1889, the defendant indorsed on said contract a formal transfer thereof, requesting said Alexander McClintock to have it duly executed and returned the next day, promising thereupon to pay the remainder of the consideration; that said transfer, as prepared by the defendant, was duly executed and acknowledged by said Mattie M. McClintock and Alexander McClintock; that on December 27, 1889, Alexander McClintock tendered to the defendant the said Donaldson contract, with the receipt and transfer indorsed thereon, and a voucher for the money due properly signed; but the defendant refused to accept the same and to pay the balance of the contract price, unless the said Alexander McClintock could induce the said S. B. Donaldson to make certain alterations in the contract which the defendant desired; that the plaintiff endeavored to induce said Donaldson to make the alterations desired by the defendant, but he refused to change the contract; that the plaintiff then offered to return to said defendant company the fifty dollars which had been paid upon the contract, and requested the company to cancel the assignment and to surren-

der all rights granted to it by the said agreement of sale; this the said company refused to do, and notified said S. B. Donaldson that the defendant company held this option by assignment from the plaintiff; that, relying on the contract with defendant as above set forth, the plaintiff was not prepared to pay said Donaldson one thousand dollars, January 1, 1890, and under the terms of the said contract with said Donaldson, forfeited her rights under the same, and lost all the valuable rights she had acquired thereby. The defendant pleaded *non assumpsit*, and the case was tried December 3, 1890. The allegations of the amended statement of claim were sustained by testimony on the part of the plaintiff, and the jury returned a verdict for the plaintiff for \$1,161.96. Judgment was entered upon the verdict, and a motion for a new trial having been denied, the defendant appealed. Other facts are stated in the opinion.

*Boyd Crumrine, Henry McSweeney, Charles M. Thorp, and E. E. Crumrine*, for the appellant.

*R. W. Irwin, John W. Donnan, A. Donnan, and M. C. Acheson*, for the appellee.

MITCHELL, J. The receipt by plaintiff's husband expressed the fact of a sale, by the acknowledgment of receipt of part of the purchase-money, and fixed the time and amount of the remaining payment. All the other terms of the contract, including the identification of the subject-matter, were shown by the original agreement of Donaldson, on which the receipt was indorsed. The two papers thus constituted one instrument, which, so far as appears on its face, was a sufficient memorandum in writing to satisfy the statute of frauds. Its defect in that regard was *dehors* the instrument itself, and lay in the want of written authority in the husband to act as agent for his wife. Had his authority been in writing at that time, even though on a separate paper, no question of the validity and binding force of the contract could have arisen. His action as agent was, however, formally ratified and adopted by the wife, in writing, before any rescission or change of position in any way by the defendant.

The exact question before us, therefore, is, whether such ratification by the wife, of its own force, perfected and validated the agent's original contract, or whether it still required acceptance by the grantee.

No case precisely in point has been found, and we are left to determine the question on general principles. It is conceded that a deed tendered by the vendor, but refused by the vendee, will not validate a parol contract, and it is argued that the present case stands upon the same footing. But I apprehend that the rule in question results from the common-law requirement that every writing must be accepted before it becomes a contract. It is sometimes said, however, that the reason a deed tendered is ineffectual under the statute is, that until such tender the vendor was not bound; the vendee could not have held him, and there being, therefore, a want of mutuality in the agreement, equity will not specifically enforce it. Whether the equitable doctrine of mutuality has any proper place in cases arising under the statute of frauds is a vexed question on which our decisions are not in harmony, and are badly in need of review and authoritative settlement: See *Tripp v. Bishop*, 56 Pa. St. 424; *Meason v. Kaine*, 63 Pa. St. 335; *Sands v. Arthur*, 84 Pa. St. 479; and the comment upon them by Judge Reed in his treatise on the statute of frauds, sec. 367. But whatever the foundation of the rule, it is doubtful if the case of ratification of an agent's act comes fairly within it. If the agent had been properly authorized, the contract would have bound both parties in the first instance, and the settled rule is, that ratification is equivalent in every way to plenary prior authority. The objection of want of mutuality is not good in many cases of dealing with an agent, for if he exceeds his authority, actual and apparent, his principal will not be bound, yet may ratify, and then the other party will be bound from the inception of the agreement. The *aggregatio mentium* of the parties need not commence simultaneously. It must co-exist; but there must be a period when the question of contract or no contract rests on the will of one party to accept or reject a proposition made, and this interval may be long or short. The offer, of course, may be revoked or withdrawn at any time prior to acceptance, but after acceptance it is too late. The contract is complete. If, in the present case, the defendants had written a letter to plaintiff, stating that they had made the agreement with her husband as agent, but that, his authority not being in writing, they requested her to send them a written ratification, and thereupon she had written and mailed an acceptance and ratification of her agent's act, there could be no question of the contract: *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339, and cases cited in 3 Am.

& Eng. Ency. of Law, 856, tit. Contract; and 13 Am. & Eng. Ency. of Law, 233, tit. Mail. And in effect, that is just what the defendant did here. It made the original agreement with the husband, evidenced by his indorsement on the Donaldson contract, which was delivered into its possession. On the day that payment was called for by the indorsed agreement, the defendant further indorsed on the contract an assignment by husband and wife, which would be a written ratification of the most formal kind of the husband's previous act, and as the jury have found, delivered it to the husband unconditionally for execution and acknowledgment. The defendant's consent to the contract sued upon was thus manifested; and upon acceptance by plaintiff, the contract became binding as a common-law contract of both parties, and upon her signature it became a contract in writing within all the requirements of the statute. The objects of the act, certainty of subject-matter, precision of terms, reliability of evidence, and clearness of intent of the land-owner, are all secured, and we see no particular in which either the letter or the policy of the statute has been violated.

The cases cited by appellee, though not decisions on the precise point, tend to sustain the conclusion here reached: *Maclean v. Dunn*, 4 Bing. 722, was under the English statute, which requires only that the agent should be "lawfully authorized"; but the opinion of Lord Chief Justice Best illustrates the effectiveness of ratification as equivalent to antecedent authority. In our own case of *McDowell v. Simpson*, 3 Watts, 129, 27 Am. Dec. 338, the opinion of Kennedy, J., is clearly expressed that a lease by an agent in excess of any authority, either parol or written, may be ratified, but the ratification to create a valid term for seven years must be in writing. So far as the case goes, it is directly in line with our present conclusion, and it has never been questioned, but on the contrary is cited with approval in *Dunn v. Rothermel*, 112 Pa. St. 272.

This disposes of the main question in the case, and with it the exceptions relating to the measure of damages fall. The plaintiff recovered only the contract price, to which she was entitled.

The only remaining assignment that need be specially noticed is the fourteenth, which is to the refusal of defendant's point that plaintiff, having allowed her estate or interest in the land to lapse or become forfeited by non-payment to Donaldson, was disabled from suing in affirmance of the contract. If

any estate remained in plaintiff, the law would certainly require her to convey it to defendant upon payment of the verdict. But her estate had expired, not through any fault of hers, but by default of payment to Donaldson, which it was not for her, but for defendant, as purchaser and assignee of her option, to make. It was precisely analogous to a purchase by defendant of a term which had a month to run, and a delay in taking possession until the expiration of the month, when the term was at end. For such a loss the purchaser, not the seller, is responsible.

Judgment affirmed.

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THE PRINCIPAL CASE involves a subject about which doubt and controversy exists, Mr. Mechem, in his work on agency, having expressed a preference for those decisions which refuse to permit a principal to ratify an unauthorized contract without the assent of the other party thereto: See *Atlee v. Bartholomew*, 69 Mo. 43; 5 Am. St. Rep. 103, and note 103-114.

AGENCY — RETROACTIVE EFFECT OF RATIFICATION. — If one who assumes to act as agent for another under pretense of authority signs his name, ratification by the principal understandingly, by an express promise to pay or by accepting a chattel mortgage as indemnity, is equivalent to previous authority: *Henry v. Heeb*, 114 Ind. 276; 5 Am. St. Rep. 613. Subsequent ratification gives an agency the force and effect of an original authority: *Stark v. Sikes*, 8 Gray, 609; 69 Am. Dec. 270, and note; *Clealand v. Walker*, 11 Ala. 1068; 46 Am. Dec. 238, and note; *Despatch Line v. Bellamy Mfg. Co.*, 12 N. H. 206; 37 Am. Dec. 203. The ratification by the principal of an unauthorized act of an agent relates to the date of such act as between the immediate parties: *Kempner v. Rosenthal*, 81 Tex. 12.

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## McKNIGHT v. MANUFACTURERS' NATURAL GAS COMPANY.

[166 PENNSYLVANIA STATE, 185.]

**LEASE OF LAND FOR OIL PURPOSES, OBLIGATIONS IMPOSED BY.** — A lease of land for oil purposes imposes upon the lessee the duty to test thoroughly the existence of oil in the rocks that should bear it, and if oil be found, to sink so many wells as may be reasonably necessary, in view of operations on adjoining lands, to secure so much of the oil from the land demised as may be obtained with profit.

**LEASE OF LAND FOR GAS PURPOSES, DUTY IMPOSED BY.** — The duty imposed upon a lessee of land to be operated for gas cannot be measured by the same rule that is applied in the case of a lease of land for oil purposes, because there are important differences between oil and gas, which make it necessary to distinguish for some purposes between an oil and a gas lease.

**GAS LEASE—LESSEE IS NOT BOUND TO SINK ADDITIONAL WELLS, WHEN.**

—Since the product of a gas well can only be transported to a market when the volume and pressure are sufficient, and the sinking of another well on premises leased may have the effect of so reducing the pressure of a producing well on the same premises as to make the product valueless, there is no implied covenant in a gas lease that the lessee will put down other wells in addition to one which he has sunk and found to be productive, but which he has been compelled to abandon by reason of the happening of an accident thereto. It is therefore error in an action brought by the lessor of land to be operated for gas purposes against a lessee who had sunk one paying gas well upon the demised premises to recover damages for not sinking other wells upon the premises to protect the territory against the effect of operations on adjoining lands, to charge that a failure to sink such wells was a breach of an implied contract imposing a liability in damages, in the absence of a reasonable excuse for such failure.

**GAS WELL—LESSEE NOT BOUND TO SINK UNTIL LESSOR LOCATES, WHEN.**

—Where a gas lease provides that the lessor shall designate the point at which all wells sunk on the demised premises shall be located, if the lessor has not fixed upon a location for a well, he cannot maintain an action against the lessee for failing to sink a well.

**ASSUMPSIT** to recover damages for alleged breaches of covenants contained in an oil and gas lease. The plaintiff leased his farm of 250 acres of land to the Canonsburg Iron Company, Limited, and the lease was subsequently assigned to the defendant company. The jury returned a verdict for the plaintiff for one thousand dollars, and judgment having been entered thereon, the defendant appealed. The other facts are stated in the opinion.

*R. W. Irwin, George W. Guthrie, and M. C. Acheson*, for the appellant.

*James P. Sayer, J. W. McDowell, and J. L. Judson*, for the appellee.

**WILLIAMS, J.** A lease of the surface for agricultural purposes implies, if it does not express, an agreement on the part of the lessee to cultivate the demised premises in accordance with the ordinary methods of husbandry. Without such cultivation, the premises will not be productive, and the landlord will suffer a substantial loss. A lease of a mine or a quarry, at a rental to be fixed by reference to the quantity of material removed therefrom, implies an agreement on the part of the lessee to work the mine or quarry. The reason is, that while the lessor does not lose his material out of the mine or quarry, he loses his income therefrom: *Watson v. O'Hern*, 6 Watts, 362; *Koch's Appeal*, 93 Pa. St. 434. A lease of land for oil purposes

imposes a somewhat different obligation upon the lessee. The oil is of such a nature that if not removed through wells upon the surface of the leasehold, it may be wholly lost to the owner of the land by reason of operations on lands adjoining. The duty to develop the land—that is, to test thoroughly the existence of oil in the rocks that should bear it, and if oil be found, to sink so many wells as may be reasonably necessary, in view of surrounding operations, to secure so much of the oil underlying the land as may be obtained with profit—grows out of the nature of oil, and the methods by which the oil is reached and brought to the surface. An oil lease must be construed, therefore, with a due regard to the known characteristics of the business: *Brown v. Vandergrift*, 80 Pa. St. 142.

Oil and gas leases are ordinarily combined in the same instrument, and are classed together. For many purposes, such classification is natural and appropriate; but this case brings us to consider an important difference between oil and gas, which makes it necessary to distinguish for some purposes between an oil and a gas lease.

Oil, when brought to the surface, is gathered into a receiving tank or tanks at or near the well. When necessary or desirable, it is removed by gravity, or by pumping, into the pipe lines that serve the district in which the well is located, and conveyed to storage tanks, where it remains until delivered to a purchaser. It is a matter of no consequence what the pressure may be at the well, for there can be none in the tanks, except that of gravity. The well that throws off violently its five thousand barrels per day, and that which reluctantly gives up four or five barrels under the persuasive power of the pump, will have their product gathered into the same lines of transportation, or resting in the same storage tanks. Gas cannot be gathered, stored, or transported in this manner. If found in sufficient quantity, it is turned from the well into the line, and the pressure at the mouth of the well is the motive power by which it is driven through the line to the consumer miles away. If the pressure at a given well is much below that in the line with which it is connected, the gas from that well cannot enter the line, but will be driven back by the superior force it encounters at the point of connection. For this reason, a well producing gas in sufficient quantity to be profitably utilized, if there was a market for it near at hand, may be entirely valueless if its product must find a market at a distance too great to justify its transportation by a line of its own. In

an oil district, each well, no matter how large or how small its product may be, is separately operated, and a well may be profitably operated so long as its yield pays more than the cost of producing the oil. In a gas district this is impracticable. The product of many wells is gathered into one line, so long as the pressure is sufficient. When the pressure in any one falls below the standard necessary for purposes of transportation, that well must be turned off. Its product cannot be transported separately, and unless it can be used near by, it is valueless. These well-known facts peculiar to the production of gas must be taken into account in the construction of leases for gas purposes.

The lease now before us shows that the parties to it were familiar with these facts, and that they dealt with the subject intelligently. The lease covered the lessor's farm of 250 acres, was to continue twenty years, and was for the "sole and only purpose of mining and excavating for petroleum, carbon, oil, and gas." Operations were to commence on the land within eighteen months after the execution of the lease, and the lessor reserved to himself the exclusive right to locate all wells that should be put down upon it. If oil was not found in paying quantities, but a sufficient flow of gas was obtained by the lessee to justify an effort to utilize it beyond the premises on which it was found, the lessee was to pay a money royalty equal to "one eighth of the net proceeds" of the gas so obtained and utilized off the premises. The royalty was changed by supplemental agreements, but the question now raised rests on the provisions of the original lease. If oil had been found in paying quantities in the first well, it is probable that the lessee, although not bound by an express covenant to do so, would have been under obligations to put down an additional well or wells, so as properly to test and develop the production of the farm of the lessor, upon a consideration of the character of the territory and the work being done on adjoining lands. But oil was not obtained, and so much of the contract as relates to it is now without significance. The parties had anticipated this contingency, and provided for it. Their contract made it the duty of the lessee to pay a royalty for gas, if the flow was sufficiently strong to enable him to utilize it off the premises; that is, if it was sufficiently strong to justify its transportation by means of a pipe line to some market, off the premises, for sale. In that case, the royalty was to be one eighth of the net proceeds of the gas so utilized. The flow of



gas was sufficiently strong. The lessees arranged to utilize it by means of a branch line built to reach this well. Meantime it was sold to another company that continued to use it until at or about the time the line was finished, and the well turned into it. This was in December, 1886. It remained in the line until the spring of 1889. The packer got out of order, and an effort was made to draw the casing and clean out the well. An accident prevented this being done, and the well was abandoned.

This action was brought in 1890, upon the theory that the lessee was under an implied covenant to put down other wells upon the premises, to protect its lines against operations upon adjoining farms by other parties. This theory appears in the plaintiff's second point, which is as follows: "That, having commenced operations on this lease, the lessee and the defendant under it were bound to prosecute the business of developing, drilling for gas or oil, and securing the same, without interruption, for the common benefit of the parties." The court made answer as follows: "Affirmed; unless the evidence shows that there was a reasonable excuse for such interruption." Again, in the plaintiff's fifth point, the court was asked to say that if the jury find gas to be a mineral of such nature that if not utilized at a proper time it may be lost forever, then it was the duty of the defendant to operate the plaintiff's land so as to secure the gas before it was lost, and its failure to do so was a breach of an implied covenant which renders it liable to damages. This point was affirmed, with the following qualification: "Provided, the prompt development and operation of the plaintiff's land was not reasonably excused by facts and circumstances that may appear from the evidence." The jury was thus left to apply the same rule, in the same manner, to a gas lease, that might be applied to a lease for the production of oil.

As we have already seen, every barrel of oil brought to the surface may be utilized in the same way. Whether the well that produces it is a strong one, yielding many barrels per day, or a weak one, yielding but few, is a matter that in no way affects the ability of the producer to market his oil, or the price to be obtained for it. In gas territory, the lessee may sink many wells, and find gas in them all, but he can utilize only such of them as have a volume and pressure sufficient to enable him to transport the gas through his line, and deliver it to the purchaser. If no one of them has the requisite press-

ure, then no one of them can be utilized; the gas must be wasted, the cost of the wells will be lost, and the lessor entitled to no royalty. What is the proper way to develop and operate a gas lease is therefore a question beset with some difficulty. Its settlement requires some general knowledge of the business, and some knowledge of the local field. The lessee may have a good well, from which he can utilize the gas with profit. He may put down another on the same farm, and thereby so reduce the pressure in the first as wholly to destroy its value, without getting a sufficient pressure at the second to enable him to utilize that. The gas, if coming from one well, would be of great value. Divided in such manner that the volume and pressure at each is below the necessary standard, the whole is lost. Thus the application of the rule laid down by the court below, as the jury must have understood it, might result in this, that the effort of the lessee to discharge the implied obligation of his contract for the common benefit should end in the total destruction of the leasehold, and a common misfortune. The mistake of the court below was in failing to take account of, and to read into the contract between the parties, the peculiar nature and characteristics of the business of producing and transporting gas, which the parties themselves well understood, and which their contract shows were before their minds when it was entered into.

But the designation of the point at which all wells should be located was the right of the lessor. We do not see, in the testimony as printed, that he ever fixed upon a location for another well, or called upon the defendant to locate one for him. He says more wells should have been put down; but the lessee had no right to put them down, except at the points which he should indicate as the location he had fixed upon. Whether the defendant is justified in abandoning the premises altogether because of the accident to the well in 1889 is a different question, and one not fairly raised upon this record. The defendant cannot hold the premises and refuse to operate them. This question may assume more importance upon another trial.

The judgment is reversed, and a *venire facias de novo* awarded.

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CUSTOM OR USAGE—EVIDENCE OF, TO AID IN CONSTRUING CONTRACTS: See note to *Smith v. Cleve*, 11 Am. St. Rep. 632; note to *Mutual Assurance Society v. Scottish Union etc. Ins. Co.*, 10 Am. St. Rep. 826; note to *Willmering v. McGaughey*, 6 Am. Rep. 678. Usage may be proved to aid in constru-

ing a contract, or the manner of discharging some duty or performing some act, but it must relate to facts, and must be shown to be uniform and generally known: *Cox v. O'Riley*, 4 Ind. 368; 58 Am. Dec. 633, and note. If the parties to a lease of land for oil and gas purposes have stipulated how many wells shall be put down, no implication can be raised that any greater number are to be drilled in accordance with a custom for the most effective operations: *Stoddard v. Emery*, 128 Pa. St. 436.

## GEIBLE v. SMITH.

[146 PENNSYLVANIA STATE, 276.]

**EASEMENT OR SERVITUDE, PROPERTY PASSES SUBJECT TO, WHEN.** — Where a continuous and apparent easement or servitude is imposed by the owner of real estate on a part thereof for the benefit of another part, and the portions are subsequently conveyed to different persons, the purchaser of the servient property, in the absence of an express reservation or agreement, takes it subject to the easement or servitude.

**TRESPASS.** The facts are stated in the opinion.

*Lev. McQuiston, J. B. Bredin, and J. C. Vanderlin*, for the appellant.

*S. F. Bowser, John M. Thompson, and William Thompson*, for the appellees.

**STERRETT, J.** After some progress had been made in the trial, the parties, by writing filed, agreed to dispense with the jury, and submitted the decision of their cause to the learned president of the common pleas, who, after full hearing, found the facts, decided the questions of law arising thereon, and directed judgment to be entered in favor of the defendants for costs, which was accordingly done. The findings of fact and conclusions of law are fully set forth in the opinion. An examination of these, in connection with the evidence relating thereto, has satisfied us that there is no error in either that calls for a reversal of the judgment.

It is unnecessary to refer at length to the facts relating to the easement, etc., which is the subject of this contention. It appears, *inter alia*, that Charles Duffy, owner of a lot fronting thirty-four feet on South Main Street, in the borough of Butler, improved the same in 1878, by erecting on the front thereof a two-story brick building, divided by a wall extending from foundation to roof. The first story was arranged for two separate storerooms; the second for other purposes. In erecting these buildings, Duffy, in connection with Ruff, who owned

the adjoining lot on the north, constructed a stairway, with hall at the head thereof, for the purpose of reaching the second story of their respective buildings, each contributing to the space necessary for that purpose. That stairway and hall, and a hall leading therefrom across the second story of Duffy's buildings to the south line thereof, were continuously used by the tenants of the second-story rooms, as their only means of ingress and egress, from the time the buildings were completed until the bringing of this suit. No other provision was ever made for reaching the second story of either of the buildings.

In 1879, after completion of the buildings, Duffy sold and conveyed to plaintiff the storeroom or building on the northerly side of the lot and adjoining Ruff, on which said stairway and halls were constructed. Plaintiff thereupon went into possession, and never questioned the right to use said stairway and halls for the purpose of ingress and egress to and from the second story of the other building, until after the same was purchased by and in the possession of the defendants, to whom Duffy conveyed in 1890. From the completion of the buildings in 1879, until after defendants purchased and went into possession of the southerly building, the "union" stairway, as it is called by the court below, and halls, were continuously, openly, and peaceably used by all the occupants of the two buildings. With full knowledge of the easement or servitude thus imposed upon the northerly part of the lot, for the common use and benefit of both buildings, the plaintiff purchased and took possession of the same. With like knowledge, and with no notice, actual or constructive, to the contrary, defendants bought and went into possession of the southerly building. In such circumstances, the plaintiff is not in a position to question the right of defendants to use the stairway and halls; and on principle as well as authority, the learned judge was right in so holding.

It is well settled, that on the conveyance of several parcels of land, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents, of property which have been created or used by the vendor during the unity of possession, though they could not then, from his general ownership, have a legal existence: Washburn on Easements, 73; Goddard on Easements, 119. Where a continuous and apparent easement or servitude is imposed by the owner of real estate on a part thereof for the benefit of another part, the purchaser at private or judicial sale, in the

absence of an express reservation or agreement, takes the property subject to the easement or servitude: *Cannon v. Boyd*, 73 Pa. St. 179; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Zell v. Universalist Soc.*, 119 Pa. St. 390; 4 Am. St. Rep. 654; *Pierce v. Cleland*, 133 Pa. St. 189.

Further comment is unnecessary. Neither of the specifications is sustained.

Judgment affirmed.

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**EASEMENT — WHEN TRANSFERRED.** — A sale of real estate on which the owner has imposed a continuous or apparent easement for another part of his property is, in the absence of some stipulation to the contrary, subject to such easement: *Zell v. Universalist Soc.*, 119 Pa. St. 390; 4 Am. St. Rep. 654, and note; *National etc. Bank v. Cunningham*, 46 Ohio St. 575; *Oswald v. Wolf*, 126 Ill. 542; note to *Kuts v. McCune*, 99 Am. Dec. 89; extended note to *Elliot v. Rhett*, 57 Am. Dec. 759. But an easement not of strict necessity will not pass by implied grant unless it is apparent and continuous: *Bonell v. Blakemore*, 66 Miss. 136; 14 Am. St. Rep. 550, and note. A perpetual easement in land, when created by grant or some proceeding equivalent to a grant, constitutes a freehold: *Chaplin v. Commissioners*, 120 Ill. 264.

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## DORNIN v. McCANDLESS.

[146 PENNSYLVANIA STATE, 344.]

**SHERIFF MAY SHOW HIS RETURN OF NULLA BONA TO BE TRUE THOUGH HE HAD MADE A LEVY.** — When a sheriff, whether indemnified or not, returns an execution *nulla bona*, he does so at his own risk, and if it is shown that there is property of the defendant which he might and ought to have levied upon, he will be responsible to the plaintiff; but it is competent for him to show that the property pointed out to him, and upon which he made an actual levy which he subsequently abandoned, was the property of a stranger, and it is error to refuse to permit him to show that fact.

**ACTION against a sheriff.** The jury returned a verdict for the plaintiff for \$119.87, and, a rule for a new trial having been discharged, judgment was entered, from which the defendant appealed. The other facts are stated in the opinion.

*R. B. Petty*, for the appellant.

*J. Y. Woods and H. S. Floyd*, for the appellee.

**PAXSON, C. J.** The plaintiff issued a *testatum fieri facias* out of the court of common pleas of Westmoreland County, directed to the defendant as sheriff of Allegheny County, and instructed him to levy upon certain personal property alleged

by the plaintiff to belong to Carson, the defendant in the execution. The sheriff levied upon the property referred to, but subsequently becoming satisfied that Carson was not the owner, he abandoned the levy and returned his writ *nulla bona*. It does not appear that he claimed to be indemnified, nor that indemnity was tendered him. This suit was brought to recover damages for not proceeding to sell the property levied upon.

Upon the trial in the court below, the defendant offered to prove by Mrs. Agnes Jane Carson, the witness on the stand, that she was the wife of Robert Carson, the defendant in the execution upon which the levy had been made by the sheriff; that in the year 1882, a decree was made entitling her to the benefits of the act of April 3, 1872 (P. L. 35), entitled "An act entitling married women to the benefit of their separate earnings"; and that the horses, wagon, and household furniture, levied on by the sheriff in this case, were her separate property, bought and paid for with her money. This offer was rejected by the court, and forms the subject of the first specification of error.

The defendant was sued for making a false return. The offer was to prove that his return was true; that the defendant in the execution had no goods upon which he could levy, and that the property which was pointed out to the sheriff as the property of said defendant was in fact the property of some one else. It would certainly be a severe rule to hold that when a sheriff is sued for making a false return he could not show that his return was true. This is precisely what we are asked to do in this case. The learned judge based his ruling upon *Miller v. Commonwealth*, 5 Pa. St. 294. It is true, there was an offer to prove in that case that the goods levied upon did not belong to the defendant in the execution, which offer was rejected by the court below and affirmed here. But in that case the sheriff had returned a levy, and the rejected offer was simply to contradict his own return. After having returned to the court that he had "levied on a horse, wagon, sleigh, and clock," the property of the defendant in the execution, he certainly had no right to show that said property belonged to some one else. His mouth was closed by his official return. As was said by Justice Coulter in that case: "Thus when he returns goods levied, with a schedule, he assumes the responsibility that they belong to the defendant; and he will afterwards, as a general rule, be estopped from denying that they

were such." Where the sheriff returns a levy upon personal property, it is a satisfaction of the judgment *pro tanto*, and there is every reason, in good sense and public policy, why he should not be allowed to contradict his return. In the case in hand, there was no return of a levy; the return was, as before stated, *nulla bona*; and the single question is, whether he can show that his return was true.

It was contended, however, that the sheriff was fixed because he had made an actual levy. It was true that certain goods had been pointed out to him as the property of the defendant in the execution, and he had levied upon them. But was this an official declaration on his part that they did belong to the defendant? At that time he had no personal knowledge in regard to the ownership, except the plaintiff's statement. If that statement was not true, if the property did not belong to the defendant, if the plaintiff had deceived him in this regard, was he bound to go on and sell, or return a levy, when he knew the property belonged to some other person? Where the sheriff has a reasonable doubt, and the property is claimed by a third person, he may demand indemnity, and if it is refused, he may decline to levy and sell, and apply to the court for relief: *Spangler v. Commonwealth*, 16 Serg. & R. 68; 16 Am. Dec. 548. And the interpleader act provides a remedy by which the sheriff may be protected in cases of doubt. But where he is in no doubt, — where he knows the property pointed out belongs to a stranger, — is he bound upon the penalty of his official bond to proceed? It is true, if he does not, he takes the risk; that is, he acts as a judge in his own case. Yet, does he incur any further penalty than to be mulcted in damages in case it turns out that he was mistaken? May he not show, in support of his return of *nulla bona*, that in point of fact the defendant in the execution had no goods upon which he could levy?

The proposition that a sheriff is bound to violate the law, and commit a trespass by levying upon property which he knows to belong to A, upon an execution against B, has no support in reason or authority. This very point was made in *Commonwealth v. Watmough*, 6 Whart. 117. There, the court below was asked to instruct the jury that, as the plaintiffs had offered to indemnify the sheriff, he was bound to proceed, whether the defendant in the execution was the owner or not. This the court refused, and this court, through Justice Kennedy, sustained the refusal in a very emphatic manner. It

was said by that learned justice, at page 140: "It would certainly have been a most palpable error in the court, if it had affirmed the proposition advanced by the plaintiff's counsel on this point. It would, in effect, have been declaring that it was the duty of the sheriff to do an illegal act because the plaintiffs had offered to indemnify him if he did so; for surely it cannot be seriously alleged that it would not be an illegal act, and a most glaring violation of law, in a sheriff to seize and sell, knowingly, the property of a stranger or third person, under an execution, who was nowise liable for the payment of the debt or money thereby directed to be levied. . . . The sheriff, it is true, is bound to take property, when pointed out to him by the plaintiff in the execution as belonging to the defendant, if it be his in fact, though it may be doubtful at the time whether it is so or not, if the plaintiff offers to indemnify him. And if he should refuse in such case, after an indemnity offered, to proceed against the property under an execution, and the plaintiff, in a suit brought against the sheriff for not having so proceeded, should show clearly that the defendant in the execution was the owner of it at the time, the plaintiff would be entitled to recover; but not otherwise. So that the sheriff, if he refuses to take and sell the property, after being offered an indemnity by the plaintiff, takes the risk and responsibility upon himself of showing, if sued afterwards by the plaintiff, that the property did not belong to the defendant named in the execution; and this is the most that can be claimed of him."

I have quoted from this opinion at some length, for the reason that we believe it embodies the true rule upon this subject. The criticism that it applies to a case of stocks is without merit. The decision is placed upon a broad ground that applies equally to other species of property. The doctrine of that case is fully affirmed in *Commonwealth v. Vandyke*, 57 Pa. St. 34, where it was held that in an action for a false return of *nulla bona*, unless that it appears that the property pointed out belonged to the defendant in the execution, an offer to indemnify the sheriff will not make him liable. The true rule to be deduced from the authorities is this: that when the sheriff returns an execution *nulla bona*, he does so at his own risk, and if it is shown that there is property of the defendant which he might and ought to have levied upon, he will be responsible. It is competent, however, for him to show that the property pointed out to him was the property of a stranger.



In other words, he may show his return to be true, for if true, the plaintiff in the execution has sustained no injury.

The judgment is reversed, and a *venire facias de novo* awarded.

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**SHERIFFS—DUTY OF, IN LEVYING EXECUTION.** — If a sheriff fails to make a levy on the personal property in the possession of a defendant, he can only discharge himself from liability by showing that the property was not subject to levy, and the burden of proof is on him: *People v. Palmer*, 46 Ill. 396; 95 Am. Dec. 418, and extended note. If, by reason of any neglect of the sheriff, any property escapes levy, he is liable to the execution plaintiff for any loss incurred thereby: *Dunlap v. Berry*, 4 Scam. 327; 39 Am. Dec. 413. In an action against a sheriff for a failure to make a return on an execution delivered to him within sixty days after its delivery, proof of the delivery and failure to return establishes *prima facie* plaintiff's right to recover the full amount that defendant was ordered in the execution to collect: *Pack v. Gilbert*, 124 N. Y. 612.

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## TOBIN v. WESTERN UNION TELEGRAPH COMPANY.

[146 PENNSYLVANIA STATE, 375.]

**ERRONEOUS TELEGRAM, RECIPIENT OF, NOT CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE, WHEN.** — Where the recipient of a telegraph message sent from Staten Island, but appearing to have been sent from South Carolina, after going to the telegraph office to make inquiry and finding it closed, has been misled into taking a fruitless trip to South Carolina, it cannot be said as matter of law that he is chargeable with contributory negligence.

**REPETITION OF TELEGRAM, RULE OF COMPANY REQUIRING, NOT APPLICABLE TO RECIPIENT.** — The rule of a telegraph company in relation to the repetition of messages to guard against mistakes, and limiting its liability for unrepeatd messages, applies only to the sender, and not to the receiver of the message.

**TRESPASS.** At the trial the plaintiff testified that he resided at McKeesport, Pennsylvania, and had a sister living in Long Island City, New York; that his sister had disappeared some time during the first week of May, 1889, and he had gone to New York to search for her; that fearing she had been drowned, he left word at the morgues in New York City, Jersey City, Brooklyn, and Staten Island, to telegraph him immediately in case his sister's body should be found; that a few days after his return to McKeesport the following message was delivered to him on the street by the defendant company: "May 12, 1889. Quarantine, S. C. (I.) To Daniel S. Cobin, McKeesport, Pennsylvania. Found the body of Mary E. Cobin. Coroner Hughes, Clifton, S. C. (I)." In the message as delivered, the

C. was written over the I. The blank upon which it was written contained the following conditions: "This company transmits and delivers messages only on conditions limiting its liability, which have been assented to by the sender of the following message. Errors can be guarded against only by repeating a message back to the sending station for comparison, and the company will not hold itself liable for errors or delays in transmission or delivery of unrepeatable messages, beyond the amount of tolls paid thereon; nor in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. This is an unrepeatable message, and is delivered by request of the sender, under the conditions named above." The plaintiff testified that he was uncertain whether the message meant Staten Island or South Carolina, and went to the telegraph office to inquire, but finding it closed, he showed the message to a clerk in a drug-store in the same building, who informed him that it was South Carolina; that by an early train next morning he started for Clifton, South Carolina, and on his return from that state he found that his sister's body had been recovered at Clifton, Staten Island. Evidence was given as to his traveling expenses. The first specification referred to in the opinion was the refusal of the court to charge the jury, at the request of the defendant: "1. That, under all the evidence in this case, their verdict should be for the defendant." The second specification referred to in the opinion was the court's refusal, at the request of the defendant, to charge: "2. That, as under the uncontradicted evidence this is an unrepeatable message, and no request was made to repeat the same, or charge paid therefor, there can be no recovery beyond the amount paid for sending the message." The other specification referred to in the opinion was, that the court erred in giving the following charge to the jury: "Again, it is claimed that on the face of the telegram or paper sent to him or delivered to him, it is said that the company does not guarantee the correctness of the message unless it be repeated. It is not necessary for us to say whether or not that is valid. I do not understand any such provision on the face of their paper, or the copy delivered to the party, will save them from the consequences of their own negligence. They are to be treated as common carriers in that way." The jury returned a verdict for the plaintiff for \$71.25, and from the judgment entered

thereon the defendant appealed. Other facts are stated in the opinion.

*George B. Gordon, John Dalzell, and William Scott, for the appellant.*

*T. C. Jones, for the appellee.*

Per CURIAM. The learned judge below could not have withdrawn this case from the jury, as requested by defendant's first point. See first specification. There was a palpable error in the telegram, by which the plaintiff was misled, and by reason thereof incurred considerable expense in a fruitless journey to South Carolina. It is no answer to this to say that some persons might not have been misled by such a blunder, and would have made further inquiry before starting upon the journey. In point of fact, the plaintiff was misled, and we cannot say he was guilty of contributory negligence.

Nor do we think the fact that the message was not repeated has any bearing upon the case. See second specification. The condition in repeated messages applies to the person sending the message, not to its recipient: *Western Union Tel. Co. v. Richman*, 19 Week. Notes, 569. In *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338, it was held that the company was not excused from liability to third persons for damages sustained by the negligent transmission of an erroneous message, by the fact that the sender did not pay for its being repeated back, in accordance with a rule of the company whereby they limited their responsibility to the transmission of messages that should be repeated back. What has been said covers the remaining specifications of error.

Judgment affirmed.

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TELEGRAPH COMPANIES — LIABILITY TO RECEIVER OF MESSAGE FOR ITS INACCURACY. — The receiver of a telegraphic message may recover damages for such loss as he may have suffered through the negligence of the company in allowing the message to be changed or altered: *Western Union Tel. Co. v. Dubois*, 128 Ill. 248; 15 Am. St. Rep. 109, and note. The liability of a telegraph company to the receiver of a message transmitted by it is not altered by the fact that the sender did not insure it or have it repeated: *New York etc. Tel. Co. v. Dryburg*, 35 Pa. St. 298; 78 Am. Dec. 338.

**ESTATE OF GOE, DECEASED.**

[146 PENNSYLVANIA STATE, 431.]

**EXECUTION, LEGACY NOT LIABLE TO, IN HANDS OF EXECUTOR, WHEN. —**

Where a testatrix in her will declares that a legacy bequeathed by her shall not be seized or levied upon for the debts of the legatee, such legacy cannot, while in the hands of the executor, be taken under execution by a judgment creditor of such legatee.

THE account of the executor of the will of Catharine Goe, deceased, showing a balance of personalty for distribution to the legatees, was called for audit January 15, 1891. A portion of the share of John S. Goe, one of the nine children and legatees of the testatrix, was claimed by the Monongahela National Bank, under an execution attachment from a judgment in its favor against said John S. Goe, the writ having been served upon the executor on December 13, 1889. John S. Goe's share of said estate was also claimed by Irene C. Goe, daughter of said John S. Goe, under an assignment dated August 17, 1889. The auditing judge awarded the share of John S. Goe to Irene C. Goe, the assignee thereof. A final decree was made confirming this adjudication, and the bank appealed. Other facts are stated in the opinion.

*C. C. Dickey and W. G. Guiler, for the appellant.*

*T. B. Searight, for the appellee.*

Per CURIAM. By agreement of counsel filed, the issue here is narrowed down to the single question, whether "the legacy given to the said John S. Goe by the said testatrix is attachable by appellant in the hands of her executor."

The will of Catharine Goe, the testatrix, contains the following clause: "It is my distinct will and desire that none of the effects, real, personal, or mixed, as above devised and bequeathed to my children, or to either of them, can be seized upon or levied upon for any debt or claim whatsoever against my husband, Henry B. Goe, or against any one of my said children."

This attachment was laid upon the fund in the hands of the executor. In *Beck's Estate*, 133 Pa. St. 51, 19 Am. St. Rep. 623, the gifts to Elizabeth Beck were given to her "expressly upon condition that they shall not be liable to be attached or seized for the debts or moneys which said Elizabeth Beck may owe at the time of my decease, but that the whole amount of her share shall be paid directly to said Elizabeth Beck by my

executor, without diminution for the payment of her said indebtedness." In that case, we held that the money was not attachable in the hands of the executor, and that the clause in the will protected it in its transit from the executor to the legatee. While the clause above cited differs somewhat from the will of Catharine Goe, we think the legal effect is the same. The testatrix has declared emphatically that the legacies to her children shall not be seized or levied upon for debt. She had a right to protect her estate against creditors of the children. She could have so protected it, even after they came into the beneficial enjoyment of it. She does not do this. She merely protects it in transit. After it reaches the hands of the children, it becomes their property absolutely, and liable to all the incidents of property, among which is that of execution and attachment. We think the case is ruled by *Beck's Estate*, 133 Pa. St. 51; 19 Am. St. Rep. 623.

The decree is affirmed and the appeal dismissed, at the costs of the appellant.

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**LEGACY — CONDITION THAT LEGACY SHALL BE EXEMPT FROM EXECUTION.** — A legacy bequeathed by a testator upon the condition that while it is in the hands of the executor it shall not be liable for the debts of the legatee is valid, and is not subject to execution by a judgment creditor of the legatee while in the hands of the executor: *Estate of Beck*, 133 Pa. St. 51; 19 Am. St. Rep. 623, and note. See *Garland v. Garland*, 87 Va. 758; 24 Am. St. Rep. 682, and extended note, for a discussion of the validity of spendthrift trusts.

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## STEINBRUNNER v. PITTSBURGH AND WESTERN R'Y Co.

[146 PENNSYLVANIA STATE, 504.]

**ERRONEOUS STATEMENT OF EVIDENCE IN CHARGE TO JURY, GROUND OF REVERSAL WHEN.** — An erroneous statement of the evidence upon the pivotal fact in the case, in the charge to the jury, is a ground of reversal, even though inadvertently made and inconsistent with the portion of the charge which immediately precedes it, since the influence which such statement may have had with the jury cannot be determined.

**DAMAGES, INSTRUCTION TO CONSIDER QUESTION OF, FROM LIBERAL POINT OF VIEW, UNWISE.** — In an action against a corporation for a negligent killing, it is at least unwise for a judge to instruct the jury that they should look at the question of damages "from a broad and sensible point of view, and liberal, because it is not a case to cut off corners too closely," although perhaps such an instruction is not of itself sufficient to justify a reversal.

**CARLISLE TABLES, ADMISSIBLE IN EVIDENCE WHEN.** — In an action for negligence resulting in death, where the deceased has been shown to

have been a strong, healthy man, and his age, occupation, and earning power have been shown, it is competent to show the expectation of life of such a man according to the Carlisle tables of mortality. Since these tables are based upon general population, and not upon selected or insurable lives, they are admissible in such a case, as some evidence competent to be considered by the jury in determining what was the actual expectation of life of the deceased. But the value of such tables, when applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of life, his social surroundings, and other circumstances, and the attention of juries should be pointedly called to those qualifying circumstances.

**TRESPASS** brought by the plaintiff, Barbara Steinbrunner, to recover from the defendant damages for the death of her husband, alleged to have been caused by the negligence of defendant's servants. The evidence showed that the deceased was killed while driving a horse and wagon across a railroad crossing in Allegheny City. The jury returned a verdict for the plaintiff for five thousand dollars, and from the judgment entered thereon the defendant appealed. The other facts necessary to an understanding of the decision are stated in the opinion.

*Johns McCleave*, for the appellant.

*Marcus A. Woodward*, for the appellee.

**PAXSON, C. J.** Upon the trial in the court below, it became a vital question of fact whether the deceased, Xavier Steinbrunner, stopped, looked, and listened just before he crossed the railroad track. One witness for the plaintiff, Miss Margaret Martin, testified distinctly that he did stop on the sidewalk crossing of Cherry Street. There was positive evidence, however, the other way. Charles Rentz, a witness for the defense, testified that the deceased did not stop. "He did n't look either way; never looked either way; just came straight through." William Cernuska testified that he saw the deceased from the time he started down the hill until he was struck by the train; that he did not stop, nor look either way; that he had a bag in his hand, and was looking at it. William F. Crooks, another witness, says: "I noticed Mr. Steinbrunner just coming out of the foot of Cherry Street, and he come on down, and when he got alongside of the side-track, about three feet this side of the first track, the wheel kind of scotched. He stopped just about a second, and then he went ahead, and when the horse was about half-way over the main track the train struck him. . . . He made no other stop. . . . Did n't

see him look up or down. He had his head down, kind of this way [illustrating]. It seems to me he was counting some money or something. I know that he did n't look up or down. When his wagon checked for that short time, I thought he was going to wait till the train passed on." Under these circumstances, we think it was error for the learned judge below to say to the jury: "The fact is uncontradicted that he did stop at the crossing on Cherry Street just as he crossed over and came on River Avenue; but did he stop for the purpose of looking out for trains?" See seventh specification. It may be the learned judge used this language inadvertently. This is probable from the fact that it is inconsistent with the portion of his charge which immediately preceded it. But as it stands, it appears to be an erroneous statement of the evidence upon the pivotal fact in the case. We cannot say what influence it had with the jury. Where a judge states the evidence in two ways, one in favor of a corporation and the other against it, a jury may be depended upon to adopt the latter.

The sixth specification alleges that the court erred in answer to the plaintiff's second point. The point involved the measure of damages, and in most respects was correctly answered. But when the learned judge told the jury that they should look at this question "from a broad and sensible point of view, and liberal, because it is not a case to cut off corners too closely," we think the expression was unwise, to say the least. Juries do not need encouragement from the court to give large verdicts against corporations, especially railroad corporations. Courts and juries should be just to both corporations and individuals, but no one has a right to be "liberal" with the money of other persons. While we are not prepared to say we would reverse for this reason alone, we have considered the matter of sufficient importance to call attention to it.

The only remaining specification of error which we think it necessary to refer to is the ninth, which alleges that the court erred in admitting certain evidence of the deceased's expectation of life, based upon the Carlisle tables. The question asked the witness was: "Will you state to the jury what the expectation of life is of a man in good health, forty-six years of age?" and the answer was: "The Carlisle table would make it 23.81 years; the American table, 23.8 years." Neither of the tables appears to have been offered in evidence, but as the answer of the witness was based upon evidence obtained from them, their effect may well be considered in connection

with this specification; and as the American table depends upon the same principle as the Carlisle table, we will discuss the question more particularly in reference to the latter.

In estimating the damages for the death of the deceased, his expectation of life became an element of importance. His earning power being fixed by the evidence, the next question to be settled by the jury would naturally be, How many years will he probably live to exercise this power? This can never be decided accurately in single cases. The most a jury or any one else can do is to approximate it. A man may die in a day, or he may live to earn wages for twenty years. It follows that there must always be an element of uncertainty in every such case. But there are some rules to be observed which aid to some extent in such investigations. Thus if a man is in poor health, especially if he is suffering from some organic disease which necessarily tends to shorten life, his expectancy is much less than that of a man in robust health. Again, the age of the person and his habits are among the important matters for consideration. It needs no argument to show that the expectation of life is much greater at twenty-one years of age than at fifty. The value of the Carlisle tables, as bearing upon this question, depends in a measure upon the manner in which they were made up. If based upon selected lives, that is to say, only upon lives which are insurable, they would be of value only for life insurance purposes, and utterly useless to apply to unselected lives or to lives generally. The evidence in this case is not very clear as to the mode in which these tables were composed. I have therefore consulted the *Encyclopædia Britannica*, a very high authority, volume 18, p. 169, from which I extract the following: "The Carlisle table was constructed by Mr. Joshua Milne from materials furnished by the labors of Dr. John Heycham. These materials comprised two enumerations of the population of the parishes of St. Mary and St. Cuthbert, Carlisle (England), in 1780 and 1787 (the number of the former year having been 7,677, and in the latter 8,677), and the abridged bills of mortality of those two parishes for the nine years, 1779 to 1787, during which period the total number of deaths was 1,840. These were very limited data upon which to found a mortality table, but they were manipulated with great care and fidelity. The close agreement of the Carlisle table with other observations, especially its agreement, in a general sense, with the experience of assurance companies, won for it a large degree of favor. No other mortality table



has been so extensively employed in the construction of auxiliary tables of all kinds for computing the value of benefits depending upon human life. Besides those furnished by Mr. Milne, elaborate and useful tables based upon the Carlisle data have been constructed by David Jones, W. T. Thompson, Christopher Sang, and others. The graduation of the Carlisle table is, however, very faulty, and anomalous results appear in the death rate at certain ages."

It appears, therefore, that the Carlisle table is based upon general population, and not upon selected or insurable lives. In *Shippen's Appeal*, 80 Pa. St. 891, it was held that the Carlisle table was not authoritative in determining the value of a life estate, and the common-law rule of one third the capital sum was adopted as the measure of the life interest. It was said in the opinion of the court: "As to the measure of the life estate of Clayton T. Platt, we may add that the Carlisle tables are not authoritative. They answer well their proper purpose, to ascertain the average duration of life, so as to protect life insurers against ultimate loss upon a large number of policies, and thereby to make a profit to the share-holders. But an individual case depends on its own circumstances, and the relative rights of the life tenant and the remainderman are to be ascertained accordingly. A consumptive or diseased man does not stand on the same plane as one of the same age in vigorous health. Their expectations of life differ in point of fact."

We can understand that in a contest between a life tenant and the remainderman, the Carlisle tables would not serve as an authoritative guide. In such instance the question must be decided upon its own facts. But in a case like the one in hand, where the expectation of life of the deceased was a question of fact for the jury, we are unable to see why the tables referred to were not competent evidence. Being intended for general use, and based upon average results, they cannot be conclusive in a given case. That is not the question here. It is whether they are not some evidence, competent to be considered by a jury. Their value, where applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of life, his social surroundings, and other circumstances which might be mentioned. While we are unable to see how such evidence is to be excluded, I must be allowed to express the fear that it may prove a dangerous element in this class of cases, unless the

attention of juries is pointedly called to the other questions which affect it.

Upon the whole, we are of opinion the evidence referred to was properly received, and this specification is not sustained.

The judgment is reversed, and a *venire facias de novo* awarded.

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**EVIDENCE — LIFE-TABLES — ADMISSION OF.** — Standard life-tables are admissible in evidence for the purpose of determining the probable duration of a human life: See note to *Louisville etc. R'y Co. v. Goodykoontz*, 12 Am. St. Rep. 380, in which the cases are collected. In estimating the measure of damages for the death of a person, the Carlisle life-tables, showing the expectancy of decedent's life, are admissible in evidence; and the *Encyclopædia Britannica*, a familiar scientific work of unquestioned authority, may be introduced to show such tables: *Warden v. Humston etc. R'y Co.*, 76 Iowa, 311.

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## BRAUNN v. KEALLY.

[125 PENNSYLVANIA, STATE, 519.]

**SALE OF OLEOMARGARINE — CONFLICT OF LAWS.** — Where plaintiff, manufacturers in Illinois, ship to the defendant, residing in Pennsylvania, oleomargarine "at factory prices in the city of Chicago, less five per cent, defendant paying freight at Pittsburgh, the point of delivery; and defendant was to receive for his services whatever price he could obtain above the bill price and freight," — the contract is one of plain sale, and not of agency, and being made and executed on delivery to the carrier in Illinois, where the dominion of the vendor over the goods ceased, and the agreed price for which the goods were sold may be recovered from the defendant in Pennsylvania, notwithstanding an act of its legislature prohibits the manufacture and sale of oleomargarine. Knowledge that the purchaser might, or even that he intended to, sell the goods contrary to the law of Pennsylvania could not vitiate a contract made and executed in Illinois. The dominion of the vendor ceased before there was any violation of the law of Pennsylvania, and even the purchaser had still the *locus penitentiae*, and might never violate the law at all.

**DEFENSE, AFFIDAVIT OF, INSUFFICIENT WHEN.** — In an action to recover the price of goods sold, an affidavit of defense by the defendant, which alleges that the plaintiff violated an agreement to give the defendant an exclusive agency for the sale of their goods, and afterwards adjusted the damages therefrom by agreeing to a certain deduction from their claim, but which does not allege that the goods sued for were bought on the faith of the agreed agency, and remain unsold by reason of its revocation, does not state a defense.

THE plaintiffs, a corporation under the laws of Illinois, having their place of business in Chicago, brought this action against the defendant, Charles Keally, doing business in the city of Pittsburgh, under the name of the Illinois Dairy Company, to

recover the sum of \$15,165.52, being the price of oleomargarine sold and delivered by plaintiffs to defendant. The defendant filed an affidavit of defense, the essential averments of which are stated in the opinion. The court below, after argument, adjudged the affidavit of defense insufficient, and rendered judgment for the plaintiffs, from which the defendant appealed. The sale of oleomargarine is prohibited in the state of Pennsylvania by the act approved May 21, 1885 (P. L. 22). Other facts appear from the opinion.

*J. S. Ferguson, E. G. Ferguson, and J. A. Emery, for the appellant.*

*S. Harvey Thompson, for the appellees.*

MITCHELL, J. The contract under which the goods were furnished by the plaintiffs to the defendant was apparently made in Illinois, as the plaintiffs' place of business was there, and the goods were delivered to a carrier in Chicago, to be carried to Pittsburgh, the freight being payable by defendant. The presumption, therefore, is, that the carrier was the defendant's agent, and there is nothing in the affidavit of defense to rebut this presumption. The element of illegality under the laws of Pennsylvania is therefore out of the case, unless plaintiffs were to do some act here contrary to law. The agreement is thus stated: "The goods were to be billed by plaintiffs to defendant at factory prices in the city of Chicago, less five per cent, defendant paying freight at Pittsburgh, the point of delivery; and defendant was to receive for his services whatever price he could obtain above the bill price and freight." Notwithstanding the ingenious color of agency thus sought to be thrown over it, this is a contract of sale. The defendant was to get the goods at the stipulated rate, and was entitled to receive the full price he could sell them for. What more or less does any purchaser do who buys to sell again? If he made a profit, it was his; there was no duty to account. If he made a loss, that also was his, for the agreement made no stipulation for recoupment. It was a plain, ordinary case of sale, and carried with it the obligation to pay the agreed price. Knowledge that the purchaser might, or even that he intended to, sell the goods contrary to the law of Pennsylvania could not vitiate a contract made and executed in Illinois. The dominion of the vendor over the subject ceased before there was any violation of the law, and even the purchaser had still the *locus penitentis*, and might never violate the law at all.

The other branch of the defense has no more merit. Plaintiffs, it is said, "agreed with defendant to give to him the exclusive agency for the sale of their goods in western Pennsylvania"; and again, "it was mutually agreed that all matters should be compromised and adjusted between them," etc. An agreement to give an agency may sustain an action for a breach; and a compromise of existing claims may be good consideration for a promise to liquidate a money demand at an agreed amount, or to make it an account stated. But, to be effective, such agreements would require proof of facts not set up in this affidavit. So far as appears in the defendant's own version, it is no more than a claim for unliquidated, if not merely speculative, profits, and an accord without satisfaction. It is not said that the goods were not bought, nor that they were bought on the faith of the agreed agency, and remain unsold by reason of its revocation. In this respect, the case differs entirely from *Ludington v. North*, 141 Pa. St. 184.

Judgment affirmed.

**SALES — A TRANSACTION, WHETHER A SALE OR WHETHER THE MERE RELATION OF PRINCIPAL AND AGENT EXISTED.** — The rule laid down in the principal case is an application of the doctrine of *Ex parte White*, *In re Nevill*, L. R. 6 Ch. 397, cited by Mr. Justice Harrison in *Robinson v. Easton*, 93 Cal. 80; 27 Am. St. Rep. 167. This was a case in which goods had been shipped to Nevill by Towle & Co., to be sold by the former, and accounted for by him at a fixed price. Nevill, however, sold the goods upon terms and at prices to suit himself. It was held that the contracts of sale made by Nevill were made on his own account, and not as the agent of Towle & Co. The court said: "If the consignee is at liberty, according to the terms of the contract between him and the consignor, to sell at any price he likes and receive payment at any time he likes, but is bound, if he sells the goods, to pay the consignor for them at a fixed price and a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent."

**SALES — ILLEGAL IN STATE WHERE SOUGHT TO BE ENFORCED.** — A sale of intoxicating liquors in Missouri, to be sold in Kansas contrary to the law of that state, may be enforced in Kansas, although the seller knew the illegal purpose of the buyer, if he did not actively engage to promote or share in it: *Feineman v. Sachs*, 33 Kan. 621; 52 Am. Rep. 547, and note. To the same effect is *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154. See also *Wagner v. Breed*, 29 Neb. 720.

**SALES — CONTRACTS FOR — LAW GOVERNING.** — Defendant ordered liquor of the agent of a firm in another state where the sale was lawful; they were put up and shipped from the firm's place of business to the purchaser. It was held that the sale was made and the contract complete at the place of shipment: *Boothby v. Plaisted*, 51 N. H. 436; 12 Am. Rep. 140, and note; *Tegler v. Shipman*, 33 Iowa, 194; 11 Am. Rep. 118. Courts will enforce contracts valid by the laws of the state or country wherein they were made, unless they

are injurious to the citizens of the state where they are sought to be enforced *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672 and note; *Woodward v. Brooks*, 128 Ill. 222; 15 Am. St. Rep. 104, and note, in which a large number of cases are collected.

**DE WALT v. BARTLEY. RIPPLE v. LACKAWANNA COUNTY. MEREDITH v. LEBANON COUNTY.**

[146 PENNSYLVANIA STATE, 523.]

**CONSTITUTIONAL LAW — ELECTIONS — BALLOT LAW — ELECTIONS, POWER OF LEGISLATURE TO REGULATE.** — The legislature has undoubted power under the constitution to regulate elections so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself, either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.

**BALLOT ACT OF JUNE 19, 1891, NOT UNCONSTITUTIONAL.** — The act of June 19, 1891, prescribing and regulating the use of an official ballot, does not contravene the constitution. Its main object is to secure a secret ballot, and it prescribes reasonable regulations to effect its object, carefully preserving the right of every elector to vote for whom he pleases, without any unnecessary inconvenience. It is in harmony with the constitutional requirement that elections shall be free and equal, and is not local or special legislation.

**"STICKER" MAY BE USED TO PLACE CANDIDATE'S NAME ON BALLOT.** — Under the ballot act of June 19, 1891, the name of any candidate not printed on the ballot may be inserted therein by the voter by the use of a printed adhesive slip, and need not be written.

**BILLS for injunction.** The first case, No. 411, was filed against the county commissioners and the controller and treasurer of the county of Philadelphia; the second case, No. 429, was filed against the county commissioners of Lackawanna County; and the third, No. 457, against the commissioners of Lebanon County. The facts sufficiently appear from the opinion.

*Amos Briggs*, for the appellants in No. 411.

*Charles C. Binney and Charles F. Warwick*, for the appellees in No. 411.

*P. P. Smith and I. H. Burns*, for the appellant in No. 429.

*Henry A. Knapp*, for the appellees in No. 429.

*George B. Schock and Thomas H. Capp*, for the appellants in No. 457.

*Luther F. Houck*, for the appellees in No. 457.

PAXSON, C. J. Each of the above cases is an appeal from the refusal of the learned judge below to grant a preliminary injunction. The object of the respective bills was to test the constitutionality of the act of assembly, approved June 19, 1891, entitled: "An act to regulate the nomination and election of public officers, requiring certain expenses incident thereto to be paid by the several counties and certain other expenses to be paid by the commonwealth, and punishing certain offenses in regard to such elections."

The effect of these proceedings, commenced in different sections of the state, is to seriously embarrass those persons whose duty it is to make the necessary preparations for holding the next general election under said act. It is therefore more important that the cases should be disposed of promptly than that we should elaborate our reasons for our decision. This opinion will be limited to the announcement of our conclusions, with such brief comments only as the occasion requires.

It is proper to observe, at this point, that the bill in each case asks us to declare the entire act unconstitutional. While certain sections of it have been especially criticised, the litigation is directed against the act as a whole. Were we to declare the sections thus criticised unconstitutional, the act thus emasculated would be of little use, even if the remainder of it could be enforced.

There is no doubt of the power of the legislature to regulate elections. It was said in the recent case of *Cusick's Election*, 136 Pa. St. 467: "The legislature has, from time to time, passed various laws to regulate elections. The object has always been to protect the purity of the ballot. It is too late to question the constitutionality of such legislation, so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself." See also *Patterson v. Barlow*, 60 Pa. St. 54. Abundance of authority might be cited were it necessary. The test is, whether such legislation denies the franchise, or renders its exercise so difficult and inconvenient as to amount to a denial.

The act provides for a secret ballot. That is manifestly its main purpose, and it is in entire harmony with article 1, section 5, of the constitution, which declares that "elections shall be free and equal." This means that every citizen shall have an equal right to cast a free ballot. This is the letter of the constitution, and it is a right which no legislature can interfere with. The spirit of the constitution requires that each voter

shall be permitted to cast a free and unintimidated ballot. This the act of 1891 was intended to secure. An election to be free must be without coercion of every description. An election may be held in strict accordance with every legal requirement as to form, yet, if in point of fact the voter casts the ballot as the result of intimidation, if he is deterred from the exercise of his free will by means of any influence whatever, although there be neither violence nor physical coercion, it is not a free and equal election within the spirit of the constitution. The framers of the act in question have evidently reached the conclusion that the only adequate guaranty of free and equal elections, within the letter and spirit of the constitution, is absolute secrecy. They therefore have provided a secret ballot.

The provisions of the act have been summarized as follows:—

1. The exclusive use of uniform official ballots, printed at the costs of the counties, containing the names of all candidates nominated, and space for the insertion of other names.

2. The legal nomination of the candidates whose names are to appear on the official ballots, such nomination to be made either,—(a) By certificates, signed by the presiding officer and secretaries of the authorized nominating body of the political party which, at the preceding election, polled three per cent of the largest vote cast for any office in the state, or in that portion of it for which the nomination is made; or (b) By papers signed by qualified electors to the number of one half of one per cent of the largest vote cast at the preceding election for any officer elected for the state at large, if the nomination is for the state at large, otherwise to the number of three per cent of the largest vote cast the preceding election for any officer elected in that portion of the state for which the nomination is made; the signatures and the qualifications of the signers of every such paper to be vouched for by five of the signers.

3. The free posting and publication of the candidates' names before election.

4. The voting in a room where electioneering and solicitation of votes is forbidden, each voter indicating his choice by either secretly marking the names of certain candidates singly or altogether, or by inserting other names.

5. The voting, in like manner, upon any question which

may be submitted to the people at an election for public officers.

6. The use of licensed and certified watchers to represent their parties at the polls, thus preventing voters from interference by irresponsible persons.

7. The covering up of the numbers on the ballots, and the sealing up of the lists to which these numbers refer, thereby preventing election officers from learning who has cast any given ballot, and removing the temptations to violate their oaths of secrecy.

8. The punishment of violations of the various provisions of the act.

It will be noticed that the act recognizes the machinery of politics, such as political parties, nominating conventions, and other matters by means of which effect is given to the popular will. This is not the first instance in which these subjects have been recognized and regulated by the legislature. In *Leonard v. Commonwealth*, 112 Pa. St. 607, it was held that "the act of June 8, 1881 (P. L. 70), entitled 'An act to prevent bribery and fraud at nominating elections, nominating conventions, returning boards, county or executive committees, and at the election of delegates to nominating conventions, in the several counties of the commonwealth,' is a lawful exercise of legislative power, and is an election law within the meaning of section 9, article 8, of the constitution."

The ground of complaint, as set forth in De Walt's appeal, is, not that it denies the right of suffrage, but that it abridges the freedom of voting, and in its practical operation it destroys the constitutional equality and uniformity in voting, by discrimination against some voters and in favor of others, notwithstanding that all of them are alike qualified under the constitution; that instead of dealing with the electors in the relation in which each stands to the state, and collectively, as members of one body, and that body the state, the act treats of the voters as they are divided into political parties by their voluntary choice; and it then confers upon the voters of some political parties favors and immunities based exclusively on numbers in party associations or groups, which it absolutely denies, under the prohibition and penalties of the act, to the voters of other political parties which in voters are less numerous, thus making numbers in political association the basis for conferring on some voters the freedom, the equality, and



the uniformity assured to every qualified elector of the state by the constitution, and for denying them to others.

To illustrate this position, our attention was called to the fact that at the last general election the highest vote polled in this state was 790,040, and that the vote cast for the Prohibition candidate was 18,429; that the vote so cast for the Prohibition candidate was less than three per cent of the entire vote cast, and that, under the provisions of the act, a candidate nominated by the Prohibition party would not be entitled to have its ticket printed at the public expense, as in the case of the other two parties. It was contended that the provision or discrimination against the Prohibition party is in violation of that clause of the constitution which declares that elections shall be free and equal, and also section 7, article 8, which declares that all laws regulating the holding of elections by the citizens shall be uniform throughout the state; that these constitutional provisions were intended to secure to every citizen equality in the manner of voting, and to prohibit the legislature from passing any law which shall give, directly or indirectly, an advantage to some voters which will not equally apply to all voters.

This contention is plausible, but unsound. The act does not deny to any voter the exercise of the elective franchise because he happens to be a member of a party which at the last general election polled less than three per cent of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets. The use of official ballots renders it absolutely necessary to make some regulations in regard to nominations, in order to ascertain what names shall be printed on the ballot. The right to vote can only be exercised by the individual voter. The right to nominate, flowing necessarily from the right to vote, can only be exercised by a number of voters acting together. Three persons may claim to be a political party, just as the three tailors of Tooley Street assumed to be "the people of England." It follows, if an official ballot is to be used, nominations must be regulated in some way, otherwise the scheme would be impracticable, and the official ballot become the size of a blanket. While so regulating it, the act carefully preserves the right of every citizen to vote for any candidate whose name is not on the official ballot, and this is done in a manner which does not impose any unnecessary inconvenience upon the voter.

It was urged, however, that when an elector desires to vote for a candidate whose name is not on the official ballot, he can only do so by writing the name of the candidate upon the ballot; and that this provision, in view of the limited time allowed the elector for this purpose, renders a compliance with it practically impossible, and in many instances would be a denial of the franchise. This is merely the *argumentum ab inconvenienti*. We cannot say, as a matter of law, that it would be practically impossible to insert the name by writing. The actual enforcement of the act will test this as well as many other matters connected with its operation. It is at least probable that when tested by experience it will be found to contain many features that will need revision and amendment. This can be safely left to the legislature, and is no reason why we should declare the act unconstitutional. Aside from this, we see nothing in it to prevent the elector from inserting the name of his candidate by the use of a "sticker," as is now practiced. The twenty-third section of the act provides that "on receipt of his ballot, the voter shall, forthwith and without leaving the space inclosed by the guard-rail, retire to one of the voting shelves or compartments, and shall prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the party name or political designation of a group of candidates, or opposite the name of the candidate of his choice, for each office to be filled, or by inserting in the blank space provided therefor any name not already on the ballot." It would be a strained construction to hold that the word "inserting," as used in the act, means inserting by writing. It certainly does not say so, and we see no reason why we should place this construction upon it. The fact that by section 12 the name of a substituted candidate is authorized to be placed upon the ballot by the use of what is commonly known as a "sticker," furnishes no sufficient reason why the name of a candidate not on the official ballot should not be inserted in the same way. On the contrary, it recognizes the convenience and the propriety of this mode of insertion.

The only specification of error in Ripple's appeal is, that the court below erred in refusing the preliminary injunction asked for. The principal ground of contention in this, as in Meredith's appeal, is, that the act in question is a local and special law, and therefore in contravention of the constitution. It was alleged to be special and local legislation, because it does not apply to any one of the cities of the commonwealth whose

boundaries are not co-extensive with the county. If the fact were as alleged, we would be compelled to declare the act unconstitutional. An examination of it, however, does not satisfy us that it does not apply to every portion of the state. Its language is general, and applies to all public offices, whether in counties, cities, boroughs, or townships. It contains a vast amount of detail, and there may be inconsistencies in some of its provisions. There are others which are not free from criticism, and, as before suggested, its practical working may disclose omissions and defects which will be doubtless corrected by the legislature in the future. The law itself may be regarded in the light of an attempt on the part of the people to secure a pure, free, and unintimidated ballot. Every presumption is in favor of the constitutionality of the law, and it would require a very clear case to justify us in striking it down on the ground of its unconstitutionality.

It is impracticable, at this time, for us to consider and discuss all the details of the act, or all the reasons and arguments urged against its constitutionality by the learned counsel representing the respective appellants. As we view the act, there is nothing in it which is so clearly a violation of the constitution as to justify this court in striking it down. It would be out of place at this time to discuss its wisdom. If it shall prove beneficial, the people will probably retain it, with such amendments as the future may show to be wise. If it does not meet with the expectation of the people, they will sweep it away.

The decree is affirmed in each case, and the appeal dismissed at the costs of the respective appellants.

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**ELECTIONS — REGULATION OF, BY LEGISLATURE.** — To prevent fraud at the ballot-box, laws may be enacted making all needful rules and regulations to that end, but they must not be so unreasonable and restrictive as to exclude a large number of voters without fault or negligence on their part: *Attorney-General v. Common Council*, 78 Mich. 545; 18 Am. St. Rep. 458; *Rogers v. Jacob*, 88 Ky. 502. The qualification of a voter, as prescribed by the constitution, cannot be abridged, extended, or changed by the legislature: *State v. Findlay*, 20 Nev. 198; 19 Am. St. Rep. 346. As to the validity of laws establishing voting qualifications, see note to *Southerland v. Norrie*, 74 Md. 326; *ante*, p. 255.

**ELECTIONS — USE OF "STICKER."** — A voter may paste a slip on his ticket if he does so in such a way as to show beyond question for whom he voted for a particular office: *People v. Scott*, 16 Mich. 283; 97 Am. Dec. 141.

## CLARKE v. WESTERN ASSURANCE COMPANY.

[146 PENNSYLVANIA STATE, 561.]

**DOUBLE INSURANCE TAKES PLACE WHEN.** — Double insurance takes place when the assured makes two or more insurances upon the same subject, the same risk, and the same interest. In such case, unless otherwise stipulated, the respective insurers are liable *pro rata*, all the policies being considered as together making but one policy. But where two policies cover the same property, but one also covers additional property, without specifying how much of the insurance applies to each property, a case of double insurance does not arise; certainly not as to the whole amount of those policies.

**PER CURIAM OPINIONS, WEIGHT OF.** — A *PER CURIAM* opinion is an opinion of the court in which all the judges are of one mind, and so clear that they do not deem it necessary to elaborate it by an extended discussion. It is of as much weight and authority as any other opinion.

**ASSUMPT.** The opinion states the case.

*Thomas Patterson, W. R. Blair, J. C. Doty, Smith, and W. S. Pier, for the appellants.*

*J. S. Ferguson and E. G. Ferguson, for the appellees.*

**PAXSON, C. J.** The plaintiffs took out a fire policy in the defendant company in the sum of \$1,250 upon "electric lamps, shades, wires, and all other electric fixtures and appurtenances," while contained in the building known as the Monongahela House, in the city of Pittsburgh. The property insured by this policy was destroyed by fire on December 5, 1889, the amount of loss thereon being \$2,120. This suit was brought to recover the amount of loss under the policy. Upon the trial below, the issue was narrowed down to the single question, Was there a double insurance on the property?

The policy in question contained the following clause: —

"This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by or expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valued or not, or by solvent or insolvent insurers, covering such property; and the extent of the application of the insurance under this policy or of the contribution to be made by this company, in case of loss, may be provided for by agreement or condition written hereon, or attached or appended hereto."

The whole amount of insurance on the buildings and contents was one hundred and seventy thousand dollars. This

was made up of several policies issued to different owners for their individual interests therein. If there was a double insurance as to all of them, the amount the plaintiffs would be entitled to recover in this suit would be the proportion that \$1,250 bears to \$170,000 upon a loss of \$2,120. In other words, they would get \$7.50. The learned judge below held, however, that the double insurance only applied to two policies of \$2,500 each, thus making the whole insurance upon this one item \$6,250, and that the amount for which the defendant company was liable under this view was \$424, with interest, for which a verdict was rendered.

The two policies referred to were those of the Northern Assurance Company of London. The property insured in these policies are described as follows: "On household goods and furniture, stoves, wines and liquors, and similar articles, embracing the whole stock belonging to the assured while contained in the brick building known as the Monongahela House. It is understood and agreed this policy covers also fixtures of every description while contained in buildings herein described." It will be seen at a glance that to apply the doctrine of double insurance to the whole of the policies issued by the Northern Assurance Company of London would work palpable injustice, for the reason that those policies cover other property not embraced in the special policy issued by defendant company, and there is nothing in the record to show how much of those policies was applicable to "electric lamps, shades, wires," etc., and how much was applicable to the other property covered thereby. To say, therefore, there was double insurance to the whole amount of those policies, as before observed, would work injustice, and lead to a result not probably contemplated by the parties. No better illustration of this view can be given than the one before stated, viz., that had all the policies contained this provision, the plaintiff would have recovered \$7.50, or a dividend upon the premiums paid by him.

In *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 477, there was a policy of insurance in one company which covered the building only of the party insured, and a subsequent policy in another company covered the building, machinery, shafting, belting, tools, lathes, planes, drills, and stock finished and unfinished; and it was held that it was not a case of double insurance. The opinion in that case was delivered by Justice Read, who cites and approves the definition of

"double insurance" as given by Mr. Arnould, as follows: "Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk, and the same interest. If there be double insurance, either simultaneously or by successive policies, in which priority of insurance is not provided for, all are insurers and liable *pro rata*. All the policies are considered as making but one policy, and therefore any one insurer who pays more than his proportion may claim a contribution from others who are liable. Fire policies usually contain express and exact provisions upon this subject." This case was decided in 1865. Justice Read cites *Howard Ins. Co. v. Scribner*, 5 Hill, 298, a case decided twenty-one years before that time, and says: "I cannot find that this decision has ever been impugned or denied by any judicial tribunal in the state of New York."

*Sloat v. Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 477, has been the law of this state for over a quarter of a century, and we would not disturb it now, unless for grave reasons. It has been accepted and acted upon in the adjustment of losses. Moreover, it has been expressly recognized as law by later cases. It was contended that *Merrick v. Germania F. Ins. Co.*, 54 Pa. St. 277, overrules it, but this is not the case, as will appear from an examination of the later case, *Royal Ins. Co. v. Roedel*, 78 Pa. St. 19, 21 Am. Rep. 1, where it was said: "We do not think *Merrick v. Germania F. Ins. Co.*, 54 Pa. St. 277, is sufficiently clear upon this point to overrule *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14; 88 Am. Dec. 477." It is true, this is criticised as only a *per curiam* opinion, but why it should have less weight for that reason is not clear. A *per curiam* is the opinion of the court in a case in which we are all of one mind, and so clear that we do not think it necessary to elaborate it by an extended discussion. Not only was *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 477, not overruled in *Royal Ins. Co. v. Roedel*, 78 Pa. St. 19, 21 Am. Rep. 1, but it was expressly followed in that case.

*Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. St. 28, does not, and was not intended to, overrule *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14; 88 Am. Dec. 477. On the contrary, it is expressly recognized. The question of double insurance was not decided in that case. I quote from the opinion: "It is perhaps an open question whether, under the authority of *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 477, a double insurance exists in the case in hand, for the reason that the Kreidersville

policy covered some articles not insured in the defendant's policy. But the language of condition 17 of the policy in suit is broader in its terms than the clause of the policy in the case referred to. It says, speaking of additional insurance, that it is 'on the property hereby insured, or any part thereof.' Without deciding this point, therefore, we will treat this as a case of double insurance, to the extent that the Kreidersville policy covered the same property as was insured by the defendant company." The opinion then proceeds to show that even if it was a case of double insurance, the defendant company was liable to the full amount of its policy.

I have endeavored to show that the authority of *Sloat v. Royal Ins. Co.*, 49 Pa. St. 14, 88 Am. Dec. 477, has not been shaken by any subsequent decision of this court. We are now asked to overrule it, because *Howard Ins. Co. v. Scribner*, 5 Hill, 298, cited by Justice Read, has been overruled in New York by *Ogden v. East River Ins. Co.*, 50 N. Y. 388; 10 Am. Rep. 492. With the highest regard for the able and learned judges who decided that case, we are not disposed to follow them in this instance. We can only do so by overturning our own cases, and we have not been convinced that they are erroneous. Our own rule is a safe one, and easily understood. Had the policies of the London company covered nothing but the property insured by the defendant, there would have been no difficulty; nor would there have been, had those policies specified the sum applicable thereto. Aside from this, the case in hand differs in a material point from *Ogden v. East River Ins. Co.*, 50 N. Y. 388; 10 Am. Rep. 492. In that case there was a total loss, exceeding largely the whole amount of all the insurance. That this fact was not without weight with the court is apparent from the following extract from the opinion: "We refrain from expressing an opinion now upon the several phases which might be developed under an insurance of this character in case of partial loss, confining our adjudication to the case before us, which was that of a total loss of the whole subject insured by all the policies."

In any view, the result reached in the court below was wrong, although this may have been caused by the manner in which the case was tried. To apply the whole of the London policies to the property covered by the defendant's policy would be unjust and illogical.

Judgment reversed, and a *venire facias de novo* awarded.

**DOUBLE INSURANCE—WHAT IS.**—If an agent knows of a prior insurance, which he mistakenly believes has expired, and acting under such belief secures another policy on the same property, which contains a clause to the effect that it shall be void if the insured shall have any insurance on the property not indorsed, known, or consented to by the company or its agent in writing, the prior policy is a breach of the condition, and will avoid the second policy: *Sanders v. Cooper*, 115 N. Y. 279; 12 Am. St. Rep. 801. To constitute double insurance, both policies must be upon the same insurable interest: *Alma etc. Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90, and note 102. Double insurance takes place when the insured makes two or more insurances on the same subject, the same risk, and the same interest, and in such insurance all the policies are considered one, and the insurers are liable *pro rata*, and are entitled to contribution. But where one policy covers only the building, and the subsequent policy covers the building, machinery, and stock finished and unfinished, it is not a case of double insurance: *Stout v. Royal Ins. Co.*, 49 Pa. St. 14, 33 Am. Dec. 477, and note.



CASES  
IN THE  
SUPREME COURT  
OF  
SOUTH CAROLINA.

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COLUMBIA CLUB *v.* McMASTER.

[35 SOUTH CAROLINA, 1.]

**ASSOCIATIONS — SOCIAL CLUBS — LIQUOR LICENSE.** — The distribution of liquors at cost by a *bona fide* incorporated social club to its members is not a sale for which a license can be required, under a general liquor law not specially mentioning such clubs.

**MUNICIPAL CORPORATIONS, POWER OF, TO IMPOSE A LICENSE ON SOCIAL CLUBS.** — Where the general law does not require a license for the distribution of liquors by a *bona fide* social club among its members, such license cannot be imposed by municipal ordinance.

*A. J. Green*, for the appellant.

*J. T. Rhett*, city attorney, for the respondent.

McGOWAN, J. The Columbia Club, relator, is a duly incorporated organization for social and literary purposes, with power to make such rules and regulations as they shall deem proper. The club-rooms are situated in the city of Columbia, used exclusively by the members, and are intended to provide for them a place where they, at small cost, can have and enjoy the privacy and privileges of a well-conducted home, together with such intercourse and amusement as are consistent with the rules and objects. And to this end they established the following rules and regulations: A small library is provided and furnished with the periodicals and literature of the day. The club is governed by a president, a vice-president, and a managing committee, who are elected by the club. Among the duties of the managing committee is to provide the necessary accommodations, servants, etc., for the members, and to have a general supervision of the affairs of the club. Before

any person can become a member of the club, he is required to be recommended by at least three active members, his name passed upon by the managing committee, and submitted to the club for election. All members (except honorary, limited to seven in number, and to which only distinguished citizens of the state or of the United States are eligible) are required to pay an initiation fee and monthly or annual dues, from which sources the club is maintained. That is to say, each resident member pays an initiation fee of fifty dollars and a monthly assessment of two dollars; each non-resident, a fee upon initiation of twenty dollars and annual dues of ten dollars; a temporary member, a fee of ten dollars for three months. The membership now and at all times hereafter not to exceed one hundred and four (104) members of all classes.

It seems that among the refreshments purchased and kept on hand, with the funds of the members obtained as aforesaid, the managing committee from time to time provides a small quantity of liquors and cigars, which are in the keeping of said committee, and are distributed to the members as they require the same by the servants of the club, the members placing an amount of money, equivalent to the cost price of the article or proportion thereof so furnished, which amount is fixed by the managing committee, and is not intended for profit, but solely to cover the cost thereof, and is expended to replace the articles so consumed; but as matter of fact the same does not cover the cost, but it is necessary, to maintain the articles aforesaid, to use a portion of the annual dues and assessments for this purpose, etc.

On February 14, 1891, the club, by its officers, was summoned to appear before the Hon. F. W. McMaster, mayor of the city of Columbia, to answer to the charge of "doing business without a license," in violation of an ordinance of the city. The officers of the club appeared, and denied the charge and the jurisdiction of the court in the premises. The city council, however, pronounced judgment against the club, and sentenced it to pay a fine of twenty dollars, and unless the same, together with an alleged license fee of two hundred dollars was paid by February 27th, then instant, ordered the chief of police to close the rooms of the club. Thereupon the relator club petitioned the court of common pleas for a writ of prohibition to restrain the mayor and all officers acting under him from proceeding further in the premises, upon the grounds that said action of the municipal court was without jurisdiction, that the city had not

imposed any license fee or tax upon the club, and in fact has no rightful authority to do so, and that the sentence of the court was wholly without authority of law.

The mayor was ordered to show cause why the writ should not be granted. The application was heard by his honor Judge Hudson, who, among other things, found as follows, viz.: "The object of the club was not to make profit out of the liquors, but merely to cover the cost price, and thus to replenish the stock; nor was the purpose to evade the laws either of the city or state, but the association is *bona fide*, and governed by rules and regulations as judicious and stringent as those of similar clubs in the cities of other states. So far as the aims, objects, purposes, rules, and regulations of the club are concerned, there is no dispute. Nothing is alleged, nor was anything attempted to be proved, derogatory to the membership or conduct of the club, but all was conceded that would allow to it a constitution and standing as free from condemnation as any similar society in any city of the land," etc. His honor, however, held that the admitted facts "constitute a sale of liquors by the club," and it was liable to pay a license fee of two hundred dollars to the city of Columbia, and therefore dismissed the petition.

The club appeals to this court, alleging error on the part of the circuit judge, upon the following, among other, grounds: 1. Because the city has no power to impose a license fee or tax upon social organizations, such as the relator; 2. Because the city has not imposed a license fee or tax upon said organization; 3. Because the sentence of the municipal court is without jurisdiction and void, in that it is not authorized by any ordinance of the city, and imposes a greater punishment than its charter allows.

The question whether social clubs, which raise the means by contribution and then distribute refreshments among its own members, are liable to a license tax for retailing spirituous liquors, has been considered by many of the courts of the country, both in England and America. The cases seem not to be in accord. We have examined many of them in the hope of being able to reconcile them, but have found it impossible to do so. We think, however, that much of the seeming conflict arises from two causes: 1. Where the alleged club, as a matter of fact, is not *bona fide* what it purports to be, but is a mere device to evade the law against retailing without a license, — in all such cases, of course, they are liable; and 2.

From the difference in the terms in the various acts upon the subject, each court construing for itself the laws and regulations of its own state. In the case before us, the difficulty first above indicated is not in our way; for it has been conceded and formally found that the Columbia Club is a *bona fide* social organization for the uses and purposes declared in its charter.

The question then is, whether under our laws, properly construed, the city authorities of Columbia had the right to require the Columbia Club to take out a two-hundred-dollar license for the year 1891, and to pay a fine of twenty dollars for not having done so. It seems that there are two kinds of licenses recognized: one to do some kind of business, called a "business license"; and the other to retail liquor, called a "liquor license." With the former kind we have no concern here, for it is not alleged that the club, as such, is engaged in any kind of "trade, business, or profession." We have to do only with the liquor license, and it seems that all the different provisions of our law upon that subject are collected in chapter 55 of the General Statutes, entitled "Of Licenses." Section 1731 of that chapter declares that "no license for the sale of spirituous liquors shall be granted in South Carolina, outside of the incorporated cities, towns, and villages of this state, and it shall be unlawful for any person or persons to sell such liquors without a license so to do." Section 1736 of the same chapter provides that "the proper municipal authorities of all incorporated cities, towns, and villages shall have power to grant licenses to retail spirituous liquors inside the incorporate limits, etc., to keepers of drinking-saloons and eating-houses, apart from taverns, and to fix the price of the same, the person to whom the same is granted being first recommended by six responsible tax-payers of his neighborhood, and entering into a bond in the sum of one thousand dollars for the keeping of an orderly house," etc. Section 1745 provides, among other things, that "all persons engaged in retailing liquors under licenses granted in accordance with this chapter shall expose their licenses to public view in their chief place of making sales, etc. . . . And every person taking out a license for sale of spirituous liquors as aforesaid shall sell the same in a room fronting the public street, without any screen, curtain, or other device for preventing the passing public from fully viewing what may be transpiring within," etc.

Now, considering these provisions together, what construc-

tion should be placed upon them? They are penal in their nature, and should be strictly construed. Is it not perfectly manifest that by the terms used, the legislature did not intend to embrace social organizations such as the Columbia Club; but on the contrary, that the true intent and meaning of all these provisions was to include only "the keepers of drinking-saloons," etc.; that is to say, a well-known class of persons who are engaged in the business of retailing liquor for a profit as a livelihood? *Expressio unius est exclusio alterius*.

But it appears that the corporate authorities of the city, on the 22d of December, 1890, passed an ordinance "to regulate licenses for the year 1891," which, it is suggested, supplemented the acts of the legislature upon the subject, and enlarged the power of the city in the matter of granting licenses. The seventh section of this ordinance reads as follows, viz: "For a license to carry on any permanent or transient trade, business, or profession, the sums hereafter mentioned shall be paid into the city treasury in gold or silver coin, United States treasury notes. . . . *Club-rooms*.—All clubs or associations where liquor is disposed of for cash, checks, or otherwise shall be required to take the regular liquor license per year, two hundred dollars." The first paragraph of this section clearly relates to business licenses, but the last paragraph, in relation to club-rooms, seems to have been an attempt to make a new law as to the persons who may be required to take out liquor licenses; but it must not be overlooked that there is no such thing as original legislative municipal authority. Incorporated cities have only the power granted to them by the legislature, — nothing more and nothing less. Therefore this ordinance must be construed in subordination to the general law upon the subject: *State v. Town Council*, 6 Rich. 404; *State v. Williams*, 11 S. C. 292.

The question then recurs, whether the regulations adopted by the club for distributing their liquors among their own members "constitute a sale" in the sense of section 1731 of the General Statutes, which makes it unlawful "to sell liquors without a license so to do." As I understand it, the law does not prohibit the use of liquors, but merely regulates the sale by indicating certain persons who may sell upon certain conditions, one of which is the production of a license, which can only be procured by paying for the same a fee or tax. The club owned the liquor, and we suppose that each of its members had the right to use his part of them as he pleased.

When he called for his share, or any part of it, and the same was delivered to him, subject to account, can we say that was an "unlawful sale" in the sense of the law? It seems to us that such view is very technical, and that the more reasonable construction is, that the regulations of the club amounted substantially to a method of dividing the property among its owners.

As before stated, the authorities upon this subject do not seem to be in accord. We must, however, decide the case according to our construction of our own laws; and looking only for the intention of the law-makers, we think the proper doctrine is announced in the text of the American and the English Encyclopedia of Law, vol. 11, tit. Intoxicating Liquors, p. 727, as follows: "*Social Clubs*. — The distribution of liquors by a *bona fide* club among its members is not 'a sale' within the inhibition of a liquor law, even though the person receiving the liquor gives money in return for it. It is otherwise, however, where such club is simply a device, resorted to as a means of evading the statute," — citing in the notes numerous cases, which we will not attempt to review: See *Graff v. Evans*, 8 Q. B. Div. 373; *Seim v. State*, 55 Md. 566; 39 Am. Rep. 419; *Chesapeake Club v. State*, 63 Md. 460; *Commonwealth v. Smith*, 102 Mass. 147; *Commonwealth v. Pomphret*, 137 Mass. 564; 50 Am. Rep. 340; *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298; *Barden v. Montana Club*, 10 Mont. 330; 24 Am. St. Rep. 27; *Piedmont Club v. Commonwealth*, 87 Va. 540.

In *Graff v. Evans*, 8 Q. B. Div. 373, Mr. Justice Field said: "In construing a statute like the present, by which a penalty is imposed, we must look strictly at the language in order to see whether the person against whom the penalty is sought to be enforced has committed any offense within the section. . . . The section must be construed by looking at the language used, and taking a large view of the object of the legislation. The enactment is limited to 'sales' of intoxicating liquors, and only seems aimed at sales made by retail dealers. The question is, whether *Graff* effected 'a sale.' I think not. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with respect to the goods," etc.

In *Piedmont Club v. Commonwealth*, 87 Va. 540, decided as lately as March, 1891, and the last judicial utterance upon the subject brought to our notice, the appeal court of Virginia unanimously held as follows: "A club formed for social purposes

allows its members only, from its stock kept for the purpose, to order liquor for himself and such friends as the rules of the club allow him to invite as guests, charging such member with liquors so ordered by him, no profit being made by the club. Held, this does not constitute a sale of liquor within the meaning of the act (Acts 1889-90, p. 242) requiring license for sale of liquor, and no license is required, the charging each member for amount used by him being a mode of apportionment or assessment of the proportionate expense to be borne by him," etc. We are unable to distinguish this case from that of the Piedmont Club of Lynchburg, above referred to.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case be remanded to the circuit court for such orders as may be thought necessary to carry out the conclusions herein announced.

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**SOCIAL CLUB—DISTRIBUTION OF LIQUOR—LICENSE.**—A social club incorporated for literary, social, and educational purposes, and not to evade the liquor laws, and which keeps liquors, furnished to members only, without profit to itself, is not a retail liquor dealer within the meaning of a statute requiring such persons to procure a license: *Barden v. Montana Club*, 10 Mont. 330; 24 Am. St. Rep. 27, and extended note at pages 35-50, in which this subject is exhaustively treated. *State v. Essex Club*, 53 N. J. L. 99, is a case in which the same condition of affairs existed as those presented by the principal case. In that case it was held that the club was guilty of selling liquors without a license, and liable for the penalty provided therefor. Where one acting as steward of an unincorporated social club delivers liquor to a non-member at the request of a member, and the same is paid for by the member, the transaction is a sale of liquor within the meaning of the law: *People v. Andrews*, 115 N. Y. 437.

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## SCOTTISH AMERICAN MORTGAGE COMPANY v. DEAS.

[35 SOUTH CAROLINA, 42.]

### HUSBAND AND WIFE—MARRIED WOMEN'S CONTRACTS—SEPARATE ESTATE.

—Where a married woman, either directly or through her agent, borrows money from another, the money so borrowed becomes at once a part of her separate estate, and her contract to repay is a contract with reference to her separate estate, which may be enforced against her, and the lender, in the absence of notice to the contrary, has a right to assume that the money was borrowed for the use of the married woman, and she is estopped from denying that fact, unless it is shown that the lender had notice to the contrary.

**HUSBAND AND WIFE—MARRIED WOMEN'S CONTRACTS—AGENCY—RATIFICATION—SEPARATE ESTATE.**—Where an application for a loan, stat-

ing that a wife is the borrower, that the land offered as security is her separate property, and that the only encumbrance thereon is a balance due on mortgage which will be satisfied out of the loan, is signed in the name of the wife by her husband, without her knowledge or consent, while he is acting as her general agent, and such signature is believed by the lender to be the signature of the wife, her subsequent ratification of the application and act of her husband, by herself signing the notes and mortgage issued thereon, will constitute the loan a debt of the wife, for which she is liable.

**STATUTES—CONSTITUTIONALITY OF—ABSENCE OF MEMBERS OF COURT.—**

A statute will not be declared unconstitutional in the absence of some of the members of the court, unless necessary to a determination of the case.

*W. M. Shannon and R. W. Shand*, for the appellant.

*P. H. Nelson and J. T. Hay*, for the respondent.

McIVER, C. J. The action in this case was for the foreclosure of a mortgage of real estate given by the defendant, Mrs. Mary R. Deas, to the plaintiff, to secure the payment of sundry notes executed by her in favor of the plaintiff. This mortgage and these notes, bearing date 15th of March, 1884, it is admitted, were executed by Mrs. Deas; but she being a married woman at the time, the defense is, that the contract evidenced by these papers was not such a one as she was capable of making at the time, under the law as it then stood. The contract in question was made to secure the repayment of money borrowed from the plaintiff, and one of the important inquiries in the case is, whether this money was borrowed by Mrs. Deas or by her husband. It seems that under the usage of the plaintiff this money was loaned upon a written application, a copy of which is set out in the "case," signed "Mary R. Deas," though the testimony shows that she did not in person sign her name, but the same was signed by her husband and co-defendant, Allen Deas; but the testimony likewise shows, or at least tends to show, that the signatures of husband and wife resembled each other so much that one not familiar with them might readily take one for the other.

This written application, amongst other items therein stated, gives the name of the borrower as "Mary R. Deas," and the husband's name as "Allen Deas." It also states that the borrower has certain specified stock on the land,—horses, cows, mules, and hogs; and in response to the inquiry whether the land proposed to be mortgaged to the plaintiff is entirely free from encumbrance, the answer is, "No; small balance on mortgage given to get advances. Will pay same out of portion of



funds." And in response to the inquiry whether the land is "leased to any one, or has any person a right of possession thereof aside from yourself?" the answer is, "No." It is undisputed that the money borrowed from plaintiff, or much the greater part of it, was used to pay a debt secured by a prior mortgage of the same land to H. G. Carrison, the small balance of the amount loaned being appropriated to the payment of insurance and the expense of negotiating the loan by plaintiff. The mortgage to Carrison was executed on the 1st of February, 1883, by Allen Deas and Mary R. Deas, his wife, and is combined with a lien on the crops, as well as a mortgage on certain personal property,—horses and mules. This lien and mortgage recites that the party of the first part, Carrison, agrees to advance to the parties of the second part, Allen Deas and Mary R. Deas, money and supplies, "to enable them to carry on their agricultural operations."

The case was referred to the master simply to take and report the testimony. The only oral testimony taken by the master is that of Allen Deas and his wife. From this testimony there can be no doubt that the land covered by the mortgage sought to be foreclosed was the separate property of Mrs. Deas, and the real question in this case is, whether her separate property can be held liable for the payment of the debt secured by the mortgage to the plaintiff.

While there can be no doubt that Mrs. Deas executed the papers evidencing and securing the mortgage debt, yet that alone would not be sufficient to bind her separate estate; the plaintiff must go farther, and show that the contract was made with reference to her separate estate. This question of the liability of a married woman upon a contract, after the amendment of 1882 and before the act of 1887 was passed, has been so often before this court recently that it cannot be necessary now to go into any discussion of the law upon the subject. It will be sufficient to quote from one of the most recent cases what must now be regarded as the settled law upon the subject. In *Hibernia Savings Inst. v. Luhn*, 84 S. C. 184, after citing numerous cases, it is said: "It must be regarded as settled, that where a married woman, either directly or through her agent, borrows money from another, the money so borrowed becomes at once a part of her separate estate, and her contract to repay the same is a contract with reference to her separate estate, which may be enforced against her; and that the lender, in the absence of notice to the contrary, has a right to assume

that the money was borrowed for the use of the married woman, and she is estopped from denying that fact, unless it is shown that the lender had notice to the contrary."

As in the case just quoted from, it seems to us that in view of this well-settled law, the material inquiries in this case are: 1. Whether the money secured by the mortgage to plaintiff was borrowed for the use of Mrs. Deas; 2. If not, whether the plaintiff, at the time of the loan, had any notice that it was borrowed for the use of her husband. While it is true that the testimony shows that though the written application for the loan was signed "Mary R. Deas," yet in fact her name was not signed by her in person, but was signed by her husband without her previous knowledge or direct authority, yet it is equally manifest that the husband supposed that he had his wife's authority to sign her name, for he says: "I signed Mrs. Deas's application for the loan myself. In matters of importance she signed for herself; not considering that of sufficient importance, I signed for her. When I brought the papers for her signature she first knew of the loan, but I had explained a short time before I brought her the papers about the loan." And Mrs. Deas in her testimony says: "When my husband brought the notes and mortgage for me to sign, I knew it was to borrow money from the Scotch Loan Company at the time I signed the notes and mortgage." And again she says: "Mr. Deas always managed my business in this county since I was married. I gave no written or verbal consent."

It is clear, therefore, that although Mrs. Deas may not have previously given her husband any express authority to sign her name to the application for the loan, that he had her implied authority to manage all of her business, and after he had signed her name to the written application for the loan, she expressly ratified and confirmed his act by executing in her own person the papers required in pursuance of the application for the loan. Any other view would, it seems to us, convict Allen Deas of attempting a fraud upon his wife, as well as upon the plaintiff, by forging her name to the application for the loan, — a view which certainly cannot be accepted. If, therefore, Mrs. Deas must be regarded as having subsequently ratified the previously unauthorized act of her husband in signing her name to the application for the loan, it is the same as if she had expressly authorized the signing of her name, and she is bound by the statements contained in such application. From these statements the plaintiff was fully justified in supposing

that the money was borrowed by Mrs. Deas for her own use, for she is expressly named as the borrower, and that the money was borrowed for her own use, as the statement is, that the money was to be used, in part at least, to remove an encumbrance from her land.

It seems to us clear that Allen Deas must be regarded as the agent of his wife in negotiating this loan from the plaintiff; for although they both testify that the husband was never appointed agent of his wife, yet from all the testimony, it is very obvious that what they really meant was, as Mrs. Deas says, that she never, "verbally or in writing," constituted Allen Deas her agent to negotiate this loan, — that is, that he had never in express terms been appointed her agent. Yet as it is undoubtedly true that agency may be and often is established by circumstances as well as by direct and express evidence, we think it cannot be doubted from all the circumstances that Allen Deas was not only the general agent of his wife in transacting all of her business, but his agency in this particular transaction was expressly recognized by her when she executed the notes and mortgage, and gave them to her husband to be delivered to the plaintiff. In this respect this case is very similar to that of *Hibernia Savings Inst. v. Luhn*, 84 S. C. 176, which had not been published when the circuit judge rendered his decree in this case.

It is contended, however, by respondents, that even if this be so, yet as plaintiff, through its agent, had notice that the money was borrowed for the purpose of paying the mortgage debt to Carrison, which it is claimed was a debt of the husband, and not of the wife, the separate estate of the wife cannot be held liable under the rule laid down above. This renders it necessary to inquire whether the Carrison debt was a debt of the husband, and so known to the plaintiff or its agent. It seems to us that the testimony unmistakably shows the contrary. In the first place, the representation made in the application for the loan, which, as we have seen, must be regarded as the representation of the wife, was, that the money was borrowed, in part at least, for the purpose of removing an encumbrance on her separate estate, which the testimony shows was the Carrison mortgage, and the terms of that mortgage, together with the testimony of both husband and wife, show beyond all dispute that the Carrison debt was the debt of the wife, and not of the husband, being contracted for supplies furnished to and used upon her plantation, — not

rented by the husband from the wife, but managed by him for the benefit of the family.

Mrs. Deas says: "Mr. Deas always managed my business in this county since I was married. I gave no written or verbal consent. I consented as a wife consents to her husband taking charge of her property. I knew that Mr. Deas was insolvent, and owned no property. Had no verbal or written lease from Mr. Deas of the land; he managed the business for me." Allen Deas says: "I was insolvent at the time I was married, December 19, 1878. I have lived upon this land with my family since that time. I have managed the property for my wife and attended all business matters for her; never leased the place from her." Now, if, as this testimony shows, Allen Deas never rented this land from his wife, but on the contrary, managed it for her, it would seem that the supplies furnished by Carrison to "run the place" would constitute a debt of the wife, contracted as to her separate estate, through her manager or agent, her husband, for which she would be liable; and money borrowed by her to pay such debt, to remove the encumbrance upon her separate estate, would constitute a debt for which she would be liable: *Wallace v. Carter*, 32 S. C. 314; *Chambers v. Bookman*, 32 S. C. 455.

Under the view which we have taken of the case, the constitutional question presented by the seventh ground of appeal does not necessarily arise, and need not therefore be considered. While this court undoubtedly has the power to declare an act of the legislature unconstitutional, and for that reason void, yet the exercise of such a power is a delicate matter, and it should not be done unnecessarily; especially where, as in this case, the court was not full when the question was presented.

It seems to us that the circuit judge, in view of the facts and the law applicable thereto, erred in holding that the contract here sought to be enforced was not such a contract as a married woman was capable of making, and for that reason adjudging that the complaint be dismissed.

The judgment of this court is, that the judgment of the circuit court be reversed, and the case be remanded to that court for the purpose of carrying out the views herein announced.

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THE SUBSEQUENT CASE of *Nott v. Thompson*, 35 S. C. 461, was an action against a married woman upon her promissory note, purchased by an innocent indorsee for value before maturity, in terms showing that it was executed

with reference to and for the benefit of her separate estate. The court held that such indorsee had a right to rely upon the statements in the note, that the maker was estopped thereby, in the absence of proof that such indorsee knew them to be false, and that the knowledge of the payee in this respect did not affect the indorsee.

**HUSBAND AND WIFE — MARRIED WOMAN'S CONTRACTS — SEPARATE ESTATE.** — A married woman is liable on her contract as one relating to separate property, when, being the owner of a farm and the personalty thereon, she purchases, upon a written order not disclosing her coverture, a farming implement: *McCormick v. Holbrook*, 22 Iowa, 487; 92 Am. Dec. 400, and note. If a married woman personally secures a loan, and it is made in good faith under a belief that it is to be hers, and she executes a mortgage upon her separate property to secure it, the husband joining, she will be liable as principal, even though the husband used the money: *Cummings v. Martin*, 128 Ind. 20; and the same is true where the application for the loan is signed by the woman per her husband, and she signs the bond and mortgage, which are delivered to the lender by the husband, and when she, upon being sued, admits their execution: *Hibernian Sav. Inst. v. Luhn*, 34 S. C. 175. A married woman cannot borrow money for the use of her husband, nor give her note therefor, nor bind her separate estate by a mortgage executed to secure such a note: *Salinas v. Turner*, 33 S. C. 231; see note to *Cashman v. Henry*, 31 Am. Rep. 445.

**STATUTES — CONSTITUTIONALITY OF — POWER OF COURTS.** — The power of the judiciary to declare an act unconstitutional is of the most responsible nature, and is not to be resorted to unless the case is clear, decisive, and unavoidable: *Santo v. State*, 2 Iowa, 165; 63 Am. Dec. 487, and note; *Baughner v. Nelson*, 9 Gill, 299; 52 Am. Dec. 694, and note.

## KENNEDY v. BOYKIN.

[35 SOUTH CAROLINA, 61.]

**INTEREST — MORTGAGE — SETTLEMENT.** — When an agreement for supplies is secured by mortgage stipulating for interest at fifteen per cent per annum, the whole to be paid out of the proceeds of a crop by a certain date, and the mortgagor, after such date, gives his note for the balance due, to draw interest at a like rate, the mortgage will only draw legal interest after the date stipulated for its payment; and the balance due, constituting the unpaid debt, so far as it is secured by the mortgage, will draw only legal interest after that date.

**PARTITION — RIGHTS OF MORTGAGEES.** — When a tenant in common gives a mortgage on a specific part of the common property, describing it by metes and bounds, under a belief that he owned it in severalty, the mortgagee has an equity to require, when partition is sought by the other co-tenants, that it shall be so made as to allot the specific portion covered by the mortgage as the share of the mortgagor, and thereby save the lien of the mortgage, provided this can be done without prejudice to the rights of the other co-tenants; and this equity, where there are several successive mortgages, inures to each mortgagee in the order of the dates of their several mortgages. The same equitable principles

apply, and the same priorities are preserved, in case of a sale, as in case of partition in kind, so far as practicable.

**MORTGAGE—RECORD OF, AS NOTICE—MISTAKE.**—A mere mistake in the record of a mortgage as to the number of acres covered by it, when the number of acres stated in the mortgage is accompanied by the words "more or less," will not restrict the lien of the mortgagee to the number of acres stated in the record. In such case the lien of the mortgagee, as against all subsequent mortgagees, extends to all the land embraced within the metes and bounds mentioned in his mortgage, notwithstanding the mistake in the record.

**APPEAL—REVIEW OF POINT NOT RAISED AT TRIAL.**—A mortgage will not be held void on appeal for uncertainty in description when the point was not raised in the court below, and the record does not show error in treating the description as sufficient.

**PARTITION.** The only facts necessary to an understanding of the opinion are those in relation to interest on a mortgage debt, stated in the opinion of the circuit court as follows: "The next question raised was as to the amount due upon this mortgage debt, it being contended that the mortgage debt bore from its date interest at fifteen per cent per annum. The master has found as a matter of law that the mortgage debt bore only seven per cent from the first day of March, 1873, when Louis D. De Saussure and Thomas L. Boykin had a settlement, wherein the balance due to De Saussure was evidenced by two notes aggregating the sum of \$4,441.91, and that upon that amount interest must be calculated at only seven per cent. In this the master is correct. The mortgage, it is very true, called for fifteen per cent upon the amounts mentioned therein, but these amounts were payable at a given day, to wit, the twentieth day of December, 1872, and no stipulation that interest should run at fifteen per cent, payable until the whole should be paid or payable annually. I think the whole debt should be paid. From the terms of the mortgage, only seven per cent could be calculated upon the balance due December 20, 1872. Hence when a balance was struck by Boykin and De Saussure on the 1st of March, 1873, that balance, in so far as the mortgage debt is concerned, could only bear seven per cent."

*W. D. Trantham, J. D. Dunlap, and H. A. De Saussure, for the appellants.*

*Buist and Buist, and J. T. Hay, for the respondents.*

**McIVER, C. J.** The object of this action is to obtain partition of certain real estate in the county of Kershaw, which formerly belonged to Burwell Boykin, and was, by his will,

given to his three sons, Thomas L. Boykin, John Boykin, and Eugene Boykin, upon the death of their mother, charged with the payment of certain legacies to their sisters. The mother having died, and the two sons, John and Eugene, having died intestate, and the legacies to the daughters having been provided for, the time for partition of the land has arrived, and the purpose now is to obtain partition amongst Thomas L. Boykin in his own right and as heir at law of his mother and of his two deceased brothers, and the other heirs at law of these parties. There is no contest between the co-tenants as to their shares or as to their right to partition, and it seems to be conceded that the share of Thomas L. Boykin in the land remaining for partition is forty-one ninetieths thereof.

The only controversy is between certain mortgage creditors of Thomas L. Boykin. Of these, there are three, practically, though there seems to have been another mortgage to Charlotte Taylor, assigned to A. H. H. Stuart, which, however, is not represented in this case, and not having been considered by the court below, is not before us. Of the three mortgages which are to be considered, the oldest is a mortgage to Louis D. De Saussure, which, though assigned to the defendants Pelzer, Rodgers, & Co., and A. B. Rose, as trustee, will, for the sake of convenience, be designated as the De Saussure mortgage. The next in date is a mortgage to the defendants Witte Brothers. The last in date is a mortgage to the defendant J. A. Armstrong. The De Saussure mortgage purports to be a mortgage on 823 acres of land, described by metes and bounds. The Witte mortgage purports to be a mortgage on 2,000 acres of land, more or less, likewise described by metes and bounds, which, it seems to be conceded, does not embrace any of the 823 acres covered by the De Saussure mortgage; but in the record of this mortgage, doubtless through an error of the recording officer, the quantity of land covered by the mortgage is stated as 200 instead of 2,000 acres, more or less. And the Armstrong mortgage purports to be a mortgage on the undivided interest of Thomas L. Boykin in the lands of Burwell Boykin, deceased. Such other facts as may be necessary to a proper understanding of the questions raised by this appeal may be gathered from the master's reports and the decree of his honor Judge Hudson, which should be incorporated in the report of this case, as well as from the previous case of *Boykin v. Boykin*, 21 S. C. 513.

The circuit judge held that the 823 acres covered by the De

Saussure mortgage was not the separate property of Thomas L. Boykin, held by him under a parol gift from his father, as contended for by the present holders of that mortgage; that as to the amount due on that mortgage, the master was right in reducing the rate of interest from fifteen to seven per cent on the mortgage after the settlement between mortgagor and mortgagee on the 1st of March, 1873, when the balance then due on the mortgage debt was ascertained; that in the partition, equity would require that the 823 acres covered by the De Saussure mortgage should be allotted to Thomas L. Boykin, so as to render the security of the mortgage available, provided the same can be done without prejudice to the other co-tenants and without injury to the other mortgagees; that as to the mistake in the record of the Witte mortgage, the holders thereof are not to suffer by the error of the recording officer, but any loss which may occur by reason of such error must fall upon the subsequent purchaser or creditor. But in this particular case, there being no error in the record as to the boundaries, that was sufficient, notwithstanding the mistake in quantity, to affect subsequent purchasers or creditors with notice, and therefore he concurs with the master in holding that the Witte mortgage, as against Armstrong, is good for the 2,000 acres; that Witte Brothers have an equity to have the 2,000 acres covered by their mortgage, or at least so much thereof as will amount to his share, allotted to Thomas L. Boykin in the partition, provided the same can be done without prejudice to the rights of the other co-tenants and the holders of the senior mortgage to De Saussure; that if it is possible, without prejudice to the rights of the other co-tenants, to allot to Thomas L. Boykin the 823 acres and the 2,000 acres, then the De Saussure mortgage would be a valid lien on forty-one ninetieths of the 823 acres, and the Witte mortgage would be a valid lien on forty-one ninetieths of the 2,000 acres; that if a sale should be necessary in order to effect partition, then forty-one ninetieths of what the 823 acres would bring should be applied to the De Saussure mortgage, and forty-one ninetieths of what the 2,000 acres would bring should be applied to the Witte mortgage, and forty-one ninetieths of what any other lands that Thomas L. Boykin's interest would cover should be applied to the Armstrong mortgage; and that a writ of partition, according to the usual practice of the court, do issue, containing directions to carry out, as far as practicable, the views above announced.



From this decree, each of the mortgage creditors except Witte Brothers appeal, upon the several grounds set out in the record, which should likewise be embraced in the report of this case. Without stating these grounds specifically here, we will proceed to state what we understand to be the several questions presented thereby: 1. Whether there was error in reducing the rate of interest on the debt secured by the De Saussure mortgage from fifteen to seven per cent per annum; 2. Whether there was error in holding that if, upon partition in kind, the 823 acres be allotted to Thomas L. Boykin as his share, the De Saussure mortgage would be a lien only on forty-one ninetieths thereof; 3. Whether there was error in holding that if the land be sold, then only forty-one ninetieths of the proceeds of the sale of the 823 acres should be applied to that mortgage; 4. Whether there was any error in the ruling as to the effect of the mistake in the record of the Witte mortgage; 5. Whether there was error in not holding that the Witte mortgage was void for uncertainty in the description of the lands covered thereby; 6. Whether there was error in ascertaining the amount due on the De Saussure mortgage.

As to the first and sixth questions, which are more questions of fact than of law, we agree to the conclusions reached by the circuit judge for the reasons given by him, and do not deem it necessary to add anything to what he has said.

As to the second question, we think there was error in holding that if the 823 acres covered by the De Saussure mortgage should be allotted to Thomas L. Boykin on the partition as his share of the common property, the lien of that mortgage would extend only to forty-one ninetieths of the 823 acres. There seems to be no doubt that at the time these several mortgages were given, Thomas L. Boykin supposed that he had a good title in severalty to all of the land as the survivor of his two brothers, John and Eugene; and this doubtless continued to be his impression until the decision of this court in the case of *Boykin v. Boykin*, 21 S. C. 513, was rendered, on the 10th of October, 1884. When, therefore, Thomas L. Boykin executed the De Saussure mortgage, he must be regarded as intending in good faith to give a lien on the whole of the 823 acres, which he supposed at the time he had a full right to do. But when it was ascertained that Thomas L. Boykin was only entitled to an undivided interest in the whole of the land, which seems to be conceded is the forty-one

ninetieths thereof, it does not by any means follow that the lien extends only to that proportion of the 823 acres, after they have been allotted to Thomas L. Boykin as his share of the whole property. His intention was to give a lien on every foot of the 823 acres, and although that intention may be either entirely or partially defeated by the failure to allot the whole or any part of the 823 acres to Thomas L. Boykin as his share of the common property, yet if the whole or any part of the 823 acres should be allotted to Thomas L. Boykin on the partition as his share of the common property, we see no reason why his intention should not be carried out by extending the lien to such portion of the 823 acres, whether it be a part or the whole, as may be allotted to Thomas L. Boykin as his share of the common property. Indeed, we think the question is practically decided adversely to the view taken by the circuit judge in the case of *Young v. Edwards*, 33 S. C. 404; 26 Am. St. Rep. 689; for although that was a case of an absolute conveyance by deed, and this is a case of a mortgage, yet we think that the equitable principles upon which that decision rested are equally applicable to the case of a mortgage.

There can be no doubt that where a tenant in common gives a mortgage on a specific part of the common property, describing it by metes and bounds, under a belief that he owned the same in severalty, the mortgagee has an equity to require, when partition is sought by the other co-tenants, that it shall be so made as to allot the specific portion covered by the mortgage as the share of the mortgagor, and thereby save the lien of the mortgage, provided this can be done without prejudice to the rights of the other co-tenants; and this equity, where there are several successive mortgages, inures to each mortgagee in the order of the dates of the several mortgages. This is upon the maxim, *Qui prior est tempore potior est jure*, as well as upon the well-recognized doctrine that where a mortgagor has made several successive sales of portions of the mortgaged premises, and the mortgagee comes for foreclosure, the property must be sold in the inverse order of the sales made by the mortgagor: *Norton v. Lewis*, 3 S. C. 25; *Lynch v. Hancock*, 14 S. C. 66; *Warren v. Raymond*, 17 S. C. 163. It seems to us, therefore, that the holders of the De Saussure mortgage have the first equity, of course subordinate to the rights of the other co-tenants, to require that either the whole of the 823 acres, or so much thereof as may be necessary to pay their debt, be allotted to Thomas L. Boykin as his share of

the common property; and that Witte Brothers have a similar equity to require that so much of the land covered by their mortgage as may be necessary to pay their debt shall be allotted to Thomas L. Boykin as his share of the common property, provided the same can be done without prejudice to the interests of the other co-tenants, and without prejudice to the superior equity of the holders of the senior mortgage. The same principles would apply to the Armstrong mortgage, which, being junior to the other two, must take rank in enforcing its equities according to its date.

This brings us to the third question, which is really disposed of by what we have said in considering the second question; for the same equitable principles should apply, and the same priorities be preserved, in case of a sale as in case of a partition in kind, as far as the same is practicable. It seems to us, therefore, that if a sale becomes necessary, the property should be divided, provided the same can be done without prejudice to the interests of the other co-tenants, so that the specific portions covered by the De Saussure and Witte mortgages may be sold separately, and that the proceeds of the sale of the 823 acres, or so much thereof as may be necessary to pay the balance due on the De Saussure mortgage, provided the same does not exceed the share of Thomas L. Boykin in the common property, be applied to the extinguishment of the De Saussure mortgage, and that if any balance should then remain due to Thomas L. Boykin, so much of the proceeds of the sale of the property covered by the Witte mortgage as may be necessary shall be applied to the satisfaction of the debt secured by the Witte mortgage, provided the amount so applied shall not exceed the share of Thomas L. Boykin in the common property; and if there should be still any balance due to Thomas L. Boykin on account of his share of the common property, such balance, to the extent necessary for the purpose, shall be applied to the satisfaction of the Armstrong mortgage, and the remainder, if any, shall be paid to Thomas L. Boykin. If, however, it shall prove to be impracticable for the property to be sold in parcels as above indicated without prejudice to the rights and interests of the other co-tenants, whose superior rights must in all contingencies be respected, it will then be for the court to devise some other scheme for the preservation, as far as possible, of the respective rights of the several parties, upon the principles above indicated, as far as they can be practically applied. It follows, therefore, that

the judgment of the court below must be modified in this respect so as to conform to the principles herein announced.

As to the fourth question, we agree with the circuit judge in the conclusion which he has reached, that the mistake in the record of the Witte mortgage, so far as the number of acres is concerned, does not affect its validity as against the Armstrong mortgage, or limit its lien to the two hundred acres mentioned in the record, but that it is a valid lien, prior to that of Armstrong, on all the land found within the metes and bounds set out in the original mortgage as well as in the record thereof. It will be observed that the only mistake in the record of this mortgage is in the number of acres supposed to be contained within the boundaries set forth,—the number stated in the record being two hundred acres, “more or less,” while in the original mortgage the number stated is two thousand acres, “more or less”; and the precise question presented is, whether such a mistake invalidates the lien or limits it to the number of acres mentioned in the record, so far as the rights of subsequent purchasers or creditors are concerned. The question is not as to the effect which any mistake in the record of a mortgage may have; as, for example, a mistake in stating the amount of the debt secured by the mortgage in the record, as two hundred dollars, when in the original it is two thousand dollars, and hence such a question does not arise in this case, and will not therefore be considered.

Confining ourselves to the question presented in the record, we think it clear that a mere mistake in the record of a mortgage as to the number of acres covered by it, especially when the number of acres there stated, as in this case, is accompanied by the words, “more or less,” cannot possibly have the effect claimed by the appellant Armstrong. The addition of those words shows very plainly that the number of acres stated is a very unimportant, and in most cases wholly immaterial, element in the description of the land intended to be conveyed or affected by the lien of a mortgage. This has long been settled in this state. As far back as 1818, Nott, J., said, in *Executors of Peay v. Briggs*, 2 Mill Const. 98, 12 Am. Dec. 656, recognized in the more recent case of *Bratton v. Clawson*, 3 Strob. 180, “that where a person purchases land by metes and bounds, represented to contain a certain number of acres, ‘more or less,’ he is entitled to recover all the lands within the prescribed limits, whatever the number of acres may be. It must be apparent from the words ‘more or less’ that the metes

and bounds are to govern, and not the number of acres." In *Gourdin v. Davis*, 2 Rich. 481, 45 Am. Dec. 745, O'Neill, J., said: "I deny that quantity has ever been regarded as a certainty in a deed. It is altogether too uncertain a matter to have such an effect." In *Baynard v. Eddings*, 2 Strob. 374, it is said: "It is seldom that quantity is of much weight in a question of location." And when we find that in *Fulwood v. Graham*, 1 Rich. 491, a grant was so located as to cover four times the number of acres stated therein, and that in *Sturgeon v. Floyd*, 3 Rich. 80, a plat annexed to a grant representing the land as containing fourteen thousand nine hundred acres was so located as to cover one hundred and thirty-six thousand acres, we must conclude that the number of acres stated in a deed or other like paper, especially with the superadded words "more or less," is a very immaterial element of description, and hence an error in stating the number of acres in the Witte mortgage, as it was recorded, cannot affect its validity.

As to the fifth question, it would be sufficient to say that so far as we can perceive, no such question was made in the circuit court, and therefore the question is not properly before us. But if it were, we are not furnished with any evidence which would enable us to say that there was any such uncertainty in the description of the land covered by the Witte mortgage as would render that mortgage void, especially in view of the fact that both the master and circuit judge seemed to think that such description was sufficient to counteract any erroneous impression which might have been formed from the error in the record as to the number of acres.

The judgment of this court is, that the judgment of the circuit court be modified as herein indicated, and that the case be remanded to that court for such further proceedings as may be necessary.

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**INTEREST.** — When an agreement to pay a certain rate of interest up to maturity is made, and nothing is said about the rate after that, the question as to what rate should be charged after maturity is a perplexing one, and the decisions are not in accord: See note to *Selleck v. French*, 6 Am. Dec. 190. A note payable with interest from date, if not punctually paid when due, carries interest from maturity only: *Fugua v. Carriel*, Minor, 170; 12 Am. Dec. 46.

**CO-TENANCY — RIGHTS OF CO-TENANTS.** — The conveyance of a specific portion of the common property by a tenant in common is not void, but it cannot operate to the prejudice of the other co-tenants: *Gates v. Salmon*, 35 Cal. 576; 95 Am. Dec. 139, and note. So creditors of one tenant in common can only enforce their claims against their debtor's portion of the common estate,

subject to all equities of the other co-tenants therein: *Peck v. Williams*, 113 Ind. 256.

**BOUNDARIES — METES AND BOUNDS.** — In a purchase of land by metes and bounds, said to contain a certain number of acres, more or less, the metes and bounds, and not the number of acres, control: *Peay v. Briggs*, 2 Mill Const. 98; 12 Am. Dec. 656, and note. In a sale of land per acre, less variation from the quantity intended to be conveyed will be taken as evidence of mistake than where a specific tract is sold by metes and bounds, and the number of acres mentioned merely as a matter of description: *O'Connell v. Duke*, 29 Tex. 299; 94 Am. Dec. 282. Where a person mortgaged a tract of land containing 242 acres as 200 acres, naming the lands of his adjoining neighbors as the boundaries, it was held that he could not claim this 42 acres as a homestead as against the mortgage: *Reid v. McGowan*, 28 S. C. 74.

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## STATE v. BOWERS.

[35 SOUTH CAROLINA, 292.]

**CRIMINAL LAW — ATTEMPT TO COMMIT FELONY.** — Soliciting another to commit a felony, accompanied by an offer of a reward, and the furnishing the means to the party solicited of committing the proposed felony, makes the crime of attempting to commit a felony complete and indictable.

**CRIMINAL LAW — ATTEMPT TO COMMIT ARSON.** — Soliciting another to commit arson, accompanied with an offer of reward to do so, and furnishing the party solicited with matches for that purpose, is an indictable attempt to commit a felony.

*Nelson, solicitor, and C. M. Efrd,* for the appellant.

*Meetze and Muller, and Johnstone, Wingard, and Cromer,* for the respondent.

McIVER, C. J. The defendant was indicted for soliciting another to commit the crime of arson, the charge in the indictment being that the defendant "willfully, unlawfully, and maliciously did solicit, entice, and endeavor to persuade one Thompson Mayer, feloniously, willfully, and maliciously, to set fire to and burn down a certain house, to wit, the dwelling-house of one Anderson G. Mayer, situate in the county and state aforesaid, by offering to pay him, the said Thompson Mayer, a certain sum of money, to wit, ten dollars, for so doing, and giving him the matches, with instructions to use them in setting the said fire to the said house."

It is stated in the "case" that defendant's counsel moved to quash the indictment, and it being admitted in the argument of that motion that the house had not been set on fire by said Thompson Mayer, the motion was granted. The cir-

cuit judge, however, in his report appended to the "case," says the motion was not, in the first instance, a formal motion to quash the indictment, but rather a proposal to have the ruling of the court upon a conceded state of facts. Whereupon the circuit judge ruled as follows: "The indictment does not charge that money was given to Thompson Mayer as a bribe to burn the house of Andrew G. Mayer; nor does it allege that the solicitation was in any manner acceded to or accepted. There is no allegation that there was in any manner the slightest movement made by Thompson Mayer towards committing the proposed arson. It was conceded by the solicitor that he could not prove that the solicitation was accepted; but on the contrary, it would appear in evidence that it was promptly rejected and exposed; that all that did occur was, that Bowers promised to give Mayer ten dollars if he would burn the house, and handed him matches, with a request that he would burn the house, which request and promise were promptly refused, and that ended it." His honor held "that a naked solicitation, promptly rejected, is wanting in the essential elements of an attempt to commit a felony, and is not indictable." He therefore suggested that an order should be drawn quashing the indictment, which was accordingly done.

From this ruling and order the state appeals, upon the several grounds set out in the record, which substantially make the single question whether solicitation to commit a felony, accompanied with an offer of a reward, and the furnishing of the means to the party solicited of committing the proposed felony, does not constitute a criminal offense at common law, and as such is indictable in the court of sessions of this state. It is not denied that an attempt to commit a felony is an indictable offense, and therefore the inquiry here is narrowed down to the question whether soliciting another to commit a felony, accompanied by an offer of a reward and the delivery to the person so solicited of the means by which the felony may be committed, constitutes an attempt to commit a felony, where the offer is rejected, and the means furnished are not used for the purpose indicated.

There is no doubt that there is some conflict of authority as to the question whether mere solicitation to commit a felony constitutes of itself an attempt to commit the felony, one of the leading text-writers on criminal law, Wharton, denying the proposition, while another standard text-writer, Bishop,

supports it. But we need not go into that question here; for in this case the offense charged does not consist of mere solicitation to commit a felony, but it is accompanied with acts, — offering a bribe and furnishing the means with which the felony could be committed; and we think it is abundantly shown by the analysis of the authorities presented in the argument of the counsel for the state, that where the solicitation to commit the felony is accompanied by such acts as are here charged, the decided weight of authority is in favor of the view that the offense is complete.

This is in accordance with reason as well as authority. There can be no doubt that a person may commit a felony either by his own hand or by the hand of another, prompted or encouraged by him; and if he undertakes to commit a felony by his own hand, and his purpose is frustrated by the failure of the inanimate agencies which he employs to serve his felonious purpose, he would unquestionably be guilty of an attempt to commit a felony. Upon the same principle, if, instead of undertaking with his own hand to effect his felonious purpose, he undertakes to employ the agency of another, furnishing him with the means requisite to effect his purpose, and offering him an inducement to do so, the fact that such agent fails him will not relieve him from responsibility for that which he not only intended to have done, but which he took the necessary steps to accomplish. If the failure of the inanimate agency to effect the purpose which he desired and intended to accomplish will not relieve him from responsibility for the felonious act which he attempted to perpetrate by the use of such agency, we do not see why the failure of his animate agent to carry out the purpose which he desired him to effect and furnished him with the means of effecting should relieve him from responsibility.

There is, however, another view of this case which will equally support the conclusion at which we have arrived. It will be observed that the indictment (the material part of which is set out above) contains no formal charge of the offense known as an attempt to commit a felony, although it seems so to have been treated by the circuit judge, and hence we have so considered it in that light in what has been said above. On the contrary, the offense charged is the solicitation of another to commit a felony, which seems to be treated in some of the cases as a different offense from that of an attempt



to commit a felony. In *Stabler v. Commonwealth*, 95 Pa. St. 318, 40 Am. Rep. 653, the indictment contained several counts, of which only the first and sixth, upon which the conviction was had, need be noticed. In the first, the defendant was charged with a felonious attempt to administer poison to one Waring, with intent to commit the crime of murder; and in the sixth count he was charged with soliciting one Neyer to administer poison to said Waring. The testimony was, that defendant solicited Neyer to put poison in Waring's spring, so that he and his family would be poisoned, offering him a reward for so doing, and handing him the poison, with directions how to use it. Neyer declined to have anything to do with it, and handed the poison back to defendant. Upon this testimony the court, adopting the views of Wharton as indicated above, held that the conviction on the first ground could not be sustained, saying: "Merely soliciting one to do an act is not an attempt to do that act." But at the same time the court held that the conviction on the sixth count must be sustained, saying: "The conduct of the plaintiff in error, as testified to by the witness, undoubtedly shows an offense for which an indictment will lie without any further act having been committed."

In a note to the case just cited, the conflicting views of Wharton and Bishop above alluded to are stated, and several cases are cited showing that "solicitation to commit crime has often been punished as solicitation." We see also in standard authorities on criminal pleading forms of indictments for solicitation to commit a crime, as well as forms of indictments for attempts to commit felonies, which are distinct and different: Archbold's Criminal Pleading, 1st Am. from 1st Lond. ed., pp. 238, 403; 2 Chitty on Criminal Law, 50; and 3 Chitty on Criminal Law, 807. If, therefore, the indictment in this case be regarded as an indictment for soliciting another to commit a felony, and not as an indictment for an attempt to commit a felony, we think it can be sustained if its allegations are established by the proof: *Rex v. Higgins*, 2 East, 5; *People v. Bush*, 4 Hill, 183; *State v. Avery*, 7 Conn. 266; 18 Am. Dec. 105; and other cases cited in 1 Bishop's Criminal Law, 7th ed., secs. 767 et seq.

It seems to us, therefore, that the circuit judge erred in his ruling, and in granting the motion to quash the indictment.

The judgment of this court is, that the judgment of the cir-

cuit court be reversed, and that the case be remanded to that court for trial.

**CRIMINAL LAW — SOLICITATION TO COMMIT FELONY.** — The solicitation to commit a felony is an indictable offense at common law: *Commonwealth v. Randolph*, 146 Pa. St. 83; *ante*, p. 782, and *note*.

## MUNRO v. LONG.

[35 SOUTH CAROLINA, 354.]

**VENDOR AND VENDEE — OUTSTANDING TITLE — RESCISSION.** — A purchaser of land who has accepted the title, and is in undisturbed possession, cannot, unless fraud or mistake is shown, sustain an action for rescission, or claim an abatement of the price, on the mere ground that there is an outstanding paramount title in another, by which the purchaser may at some time be defeated.

**VENDOR AND VENDEE — OUTSTANDING TITLE — RESCISSION — MISTAKE — EVIDENCE.** — The foreclosure of a purchase-money mortgage on land cannot be avoided by the purchaser in unchallenged possession who does not allege fraud, on the ground that at the time of the purchase he was mistaken in supposing that he bought a fee-simple title, and is now informed and believes that he purchased only a life estate. In such case the opinion of others as to the title purchased is immaterial.

*D. A. Townsend and T. S. Moorman*, for the appellant.

*William Munro*, for the respondent.

McIVER, C. J. The plaintiff, as master for Union County, brings this action for the foreclosure of a mortgage of real estate, given to secure the payment of the credit portion of the purchase-money of a tract of land sold by him as such master, under proceedings for the settlement of the estate of William Long, deceased. Defendant in his answer admits the execution of the note and mortgage sued upon, but sets up as a defense the following: that the land, the purchase-money of which he is now sued for, originally belonged to William Long, who by his will devised it to his wife Miriam for life, with contingent remainders to others, as appears by a copy of said will filed as an exhibit to his answer; that after the death of the said life tenant, proceedings were instituted for the settlement of the estate of said William Long, to which none of the contingent remaindermen were made parties, although some of them were then *in esse*; and that under an order made in said cause, which is still pending, the land in question was sold and bought by the defendant at its full fee-simple value,

he then supposing, and being so advised by eminent counsel, that he was buying a fee-simple title, but that he is now informed and believes that he was erroneously advised, and that he bought only a life estate; and he therefore prays judgment that the complaint be dismissed, or that the proceedings in this case be stayed until the proceedings under which the land was sold be amended, by making the contingent remaindermen parties thereto, so that he may obtain a fee-simple title.

All the issues in the action were referred to a referee, or special master, who made his report, overruling the defense set up, and recommending that the plaintiff have judgment of foreclosure, and this report, being heard by his honor Judge Norton upon exceptions thereto, was duly confirmed. From this judgment defendant appeals upon the several grounds set out in the record.

We do not propose to take up these exceptions *seriatim*, but shall confine ourselves to the consideration of the questions really presented. For this purpose it will be necessary to state certain facts, gathered from the report of the special master, and from the testimony filed with the report. From these sources we learn that the land was sold under an order made in the case of *Smith v. Winn*, to which case the defendant herein was a party, from which order there does not appear to have been any appeal. It also appears that in taking the testimony in this case, the defendant, C. R. Long, while on the stand as a witness, was asked the following question: "What was the opinion of the children of William Long, deceased, as to what title you had purchased?" which was ruled out, and defendant excepted. This ruling, which was sustained by the circuit judge, is made the basis of defendant's last ground of appeal.

The real question made by this appeal is, whether the circuit judge erred in holding that there was no such mistake of law on the part of appellant as entitled him to relief in this case. The mistake, if any, which was made by the defendant was either in the construction of the will of William Long, or in supposing that the contingent remaindermen were no necessary parties to the proceedings under which the land was sold, in order to invest a purchaser at such sale with a fee-simple title. It will be observed that this is not a case for the enforcement of an executory contract of sale, but it is an action for the purchase-money of the property sold, of which

the party is in the undisturbed, and so far as the testimony shows the unchallenged, possession. Since the cases of *Whitworth v. Stuckey*, 1 Rich. Eq. 404, and *Van Lew v. Parr*, 2 Rich. Eq. 321, the latter of which was decided by the late court of errors, it cannot be doubted that a purchaser of land who has accepted the title, and is in undisturbed possession, cannot, unless fraud or mistake is shown, sustain an action for rescission, or claim an abatement of the price, on the mere ground that there is an outstanding paramount title in another by which the purchaser may at some time be defeated.

Now, in this case there is no allegation, and certainly no proof, of any fraud, and the only question, therefore, is, whether there was any such mistake as would entitle appellant to relief. The mistake claimed is not a mistake of fact, for appellant certainly knew, or ought to have known, all the facts when he bought; but the claim is, that there was a mistake of law. Without undertaking to go into any discussion of what is called in one of the cases (*Norman v. Norman*, 26 S. C. 48) the nice and "shadowy" distinction between a mistake of law and ignorance of law, it is sufficient for us to say that there was no such mistake of law, even under the cases which have gone to the extreme in that direction, as would relieve defendant. The mistake claimed to have been made was either in the construction of the will, or in supposing that the rights of the contingent remaindermen would be barred by the order of sale made in a cause to which they were not parties. If the former, it is very obvious from the cases of *Keitt v. Andrews*, 4 Rich. Eq. 349, and *Cunningham v. Cunningham*, 20 S. C. 317, that such a so-called mistake would not be sufficient, for, as said by Dargan, C., in his circuit decree in *Keitt v. Andrews*, 4 Rich. Eq. 349, adopted by the courts of appeals, a misconstruction of a will "is rather an error of the judgment than a mistake either of the law or fact." If, however, the mistake really relied upon (as seems to be the fact from appellant's argument here) was in supposing that the contingent remaindermen were not necessary parties, that, upon the same principle, would not be sufficient.

But in addition to this, the appellant here was a party to the action in which the order of sale was granted, and if such order was made in the absence of necessary parties, he is equally responsible with all the other parties to that action for the omission to bring all necessary parties before the court, before the order of sale was made, and if he sustains any in-

jury by reason of such omission, it must be attributed to his own fault or error of judgment, from which he can claim no relief, — certainly not in this action, brought to recover the purchase-money of property which he participated in inducing the court to sell, and of which he is now in the undisturbed and unchallenged possession. But in addition to this, it seems to us that if appellant is entitled to any relief at all, as to which we express no opinion, he should seek it in the case in which the order of sale was made, which is still pending; and in fact the record before us shows that the appellant has sought relief there, but with what result the record does not show.

As to the last ground, it is very clear that there was no error in ruling out the testimony there referred to. Certainly the opinions of the other children of William Long were wholly irrelevant to the issue before the court; for even if had it appeared that they were laboring under the same error of judgment as the appellant, that could not affect the legal rights of the parties.

The judgment of this court is, that the judgment of the circuit court be affirmed.

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**VENDOR AND PURCHASER — RESCISSION OF SALE BY PURCHASER.** — Where a vendor makes misrepresentations in relation to the title to land, though innocently and under a belief of their truth, and the vendee is thereby deceived to his prejudice, the latter is entitled, without previous eviction, to rescind: *Rimer v. Dugan*, 39 Miss. 477; 77 Am. Dec. 687, and note. Though the state of a title appear from the record, a misrepresentation by the vendor with respect thereto will entitle a purchaser to rescission: *Parham v. Randolph*, 4 How. 435; 35 Am. Dec. 403, and note. An attempt to recover part of the purchase-money on a contract of sale is an attempt to undermine an executed contract, and the purchaser cannot invoke in favor of such an action principles which apply to actions for the enforcement of executory contracts: *Scott v. Glenn*, 87 Cal. 221.

## MADDEN v. PORT ROYAL AND WESTERN CAROLINA RAILWAY COMPANY.

[35 SOUTH CAROLINA, 381.]

**NEGLECT — SUFFICIENCY OF COMPLAINT.** — A complaint in an action to recover for personal injuries caused by the negligence of the defendant need only allege that the injuries were so caused, and the facts from which the negligence may be reasonably inferred by the jury.

**NEGLECT — SUFFICIENCY OF COMPLAINT.** — A complaint in an action against a railway company to recover for personal injury caused by its negligence, which alleges that defendant, well knowing that plaintiff was a passenger, the delicate state of her health, and that it was dangerous for her to alight from the train without the aid of a foot-stool, failed to stop its train at the usual place at the station to which she had bought a ticket, but stopped at a more dangerous place, and, contrary to its custom, failed to furnish a foot-stool to assist her to alight, by reason of which facts, and the further fact that the train stopped only a short time, plaintiff was compelled to jump from the train to the ground, and in so doing sustained the injuries complained of, sufficiently states a cause of action, without stating the probative facts necessary to sustain the allegation of knowledge on the part of the defendant.

*Joseph Ganahl, and Simpson and Barksdale*, for the appellant.

*R. C. Watts, Westmoreland and Haynsworth, and F. P. McGowan*, for the respondent.

McIVER, C. J. The only question presented by this appeal is, whether the circuit judge erred in overruling the demurrer based upon the ground that the complaint did not state facts sufficient to constitute a cause of action. Looking into the complaint for the purpose of determining this question, we find that the plaintiff was a passenger on defendant's train, and that her destination was High Point, in the county of Laurens, South Carolina, where she alleges she received injuries in getting off the train, by reason of defendant's negligence, and she brings this action to recover damages for the injuries thus sustained. The allegations which are demurred to as insufficient to state any cause of action are those contained in the fourth, fifth, and sixth paragraphs of the complaint, which read as follows: "4. That it was the duty of the defendant, common carrier, to have a suitable stopping-place at the station at High Point, and to provide a foot-stool at the steps of said car for the use of passengers alighting from said train. 5. That at the time aforesaid the defendant, in carrying the said plaintiff as a passenger, negligently failed to stop its train at the

usual stopping-place at High Point, but stopped some distance from said usual stopping-place, at a point where the distance from the steps of said train to the ground was considerable and unsafe; the said defendant, well knowing that the said plaintiff was a lady in delicate health, and that it was dangerous for said plaintiff to alight from the train without the use of the foot-stool, which was not provided for her, although it was the duty and custom of the defendant so to provide. & That in consequence of the negligence of the defendant as aforesaid, and in consequence of said train stopping only a very short time, the plaintiff, at said time and place, in alighting from said train, was compelled to jump from said train to the ground, and in so doing was much injured in her person by the displacement of her womb."

To sustain an action like this, it is necessary for the plaintiff to allege and prove that she has been injured in her person by the negligence of the defendant; the cause of action being the negligence of the defendant, whether of omission or commission, followed by some injury resulting therefrom. There being no question that the fact of injury is sufficiently alleged in the complaint, the only inquiry is, whether the other element in the cause of action — the negligence of the defendant causing the injury — has likewise been sufficiently alleged. Negligence being a mixed question of law and fact, it is not sufficient to allege in general terms that an injury has been sustained by reason of the negligence of the defendant, but the plaintiff must go on and allege the facts constituting such negligence which, if believed by the jury, would be sufficient to warrant a finding that the defendant had been guilty of negligence. So that the real inquiry here is, whether the facts stated in the complaint as constituting negligence are such as, if believed by jury, negligence may be reasonably inferred by the jury, it being exclusively for the jury to say whether negligence ought to be inferred from such facts. This is the principle laid down in *Hooper v. Columbia etc. R. R. Co.*, 21 S. C. 549, 53 Am. Rep. 691, in reference to a question of nonsuit, and approved in several subsequent cases: *Couch v. Charlotte, etc. R. R. Co.*, 22 S. C. 562, 563; *Kaminitsky v. Northeastern R. R. Co.*, 25 S. C. 59; and *Simms v. South Carolina R'y Co.*, 26 S. C. 495. The same principle, as it seems to us, applies in the consideration of the question whether a complaint states facts sufficient to constitute a cause of action. If the facts stated are such as from them negligence may be reasonably inferred

by the jury, that is sufficient; and it is not necessary, or even proper, for the court to go further, and inquire whether from such facts negligence ought to be inferred.

The facts stated in the complaint as tending to show negligence on the part of the defendant are, that the plaintiff being a passenger on defendant's train, well known to defendant as a lady in delicate health, and that it was dangerous for her to alight from the train without the aid of a foot-stool, which it was the custom of defendant to provide, defendant did not stop its train at the usual stopping-place at High Point station, the destination of plaintiff, but stopped the train some distance from the usual stopping-place, at a point where the distance from the steps to the ground was such as to render it unsafe for a person in the condition in which the plaintiff was known to be by defendant to alight from the train without the aid of a foot-stool, which was not provided, by reason of which facts, and the further fact that the train stopped only a short time, plaintiff was compelled to jump from the train to the ground, and in so doing sustained the injuries complained of. If these facts should be established to the satisfaction of the jury, and nothing more should appear, we cannot undertake to say that the jury might or could not infer negligence on the part of defendant; but whether they ought to draw such an inference is a question as to which we have neither the right nor the disposition to express or even intimate any opinion.

While we fully indorse the rule as laid down in *Renneker v. South Carolina R'y Co.*, 20 S. C. 222, and recognized in the subsequent case of *Simms v. South Carolina R'y Co.*, 27 S. C. 271, as to the standard by which the duty of a railroad company to provide for the security and safety of persons entering or leaving its trains is to be tested, yet we do not see its application to a case like the present, where the allegation is not only that the infirmity of the plaintiff was well known to the defendant, but also that it was dangerous for her to alight from the train without the aid of a foot-stool, which it was the custom of defendant to provide, but which was not provided in this instance. The allegation of knowledge on the part of defendant was sufficient without going on to state the probative facts necessary to sustain such allegation. It seems to us, therefore, that there was no error on the part of the circuit judge in overruling the demurrer.

The judgment of this court is, that the judgment of the circuit court be affirmed.



**NEGLECTENCE—SUFFICIENCY OF COMPLAINT IN ACTIONS FOR.**—A complaint against a railroad company, which alleges that through the negligence of the company a car in which the plaintiff was riding was derailed, and he was injured, is sufficient without stating the particular acts of negligence causing the derailment: *Gulf etc. R'y Co. v. Wilson*, 79 Tex. 371; 23 Am. St. Rep. 345; note to *Holland v. Bartch*, 16 Am. St. Rep. 313. The allegation that defendant negligently committed the particular act which caused the injury is sufficient, and it is not necessary to plead all the incidental facts and circumstances: *Davis v. Guarnieri*, 45 Ohio St. 470; 4 Am. St. Rep. 548. Negligence may be charged in general terms: *Ohio etc. R'y Co. v. Walker*, 113 Ind. 196; 3 Am. St. Rep. 638; *Deller v. Hofferberth*, 127 Ind. 414; *Chiles v. Drake*, 2 Met. 146; 74 Am. Dec. 406. The negligence for which a recovery is sought must be alleged in the complaint: *Roseworn v. Washington etc. Mining Co.*, 84 Cal. 219. Under Hill's Code, sec. 66, in actions for damages for negligence the plaintiff must allege in his complaint the acts or omissions of the defendant upon which he bases his right to recover: *Woodward v. Oregon R'y etc. Co.*, 18 Or. 289. To the same effect, see *Missouri Pac. R'y Co. v. Hennessey*, 75 Tex. 155; *Devino v. Central Vermont R. R. Co.*, 63 Vt. 98. A complaint for negligence in causing personal injury need not aver that plaintiff was in the exercise of due care: *Thompson v. North Missouri R. R. Co.*, 51 Mo. 190; 11 Am. Rep. 443; *Potter v. Chicago etc. R'y Co.*, 20 Wis. 533; 91 Am. Dec. 444, and note; *Southwest Imp. Co. v. Andreu*, 86 Va. 270.

## SPELLMAN v. RICHMOND AND DANVILLE RAILROAD COMPANY.

[25 SOUTH CAROLINA, 475.]

**DAMAGES—PLEADING.**—Causes of action in tort, and sounding in damages, either actual or exemplary, must be properly pleaded. The complaint must state the kind of damages claimed, and the testimony, and the jury must be restricted to the allegations.

**DAMAGES—ACTUAL AND EXEMPLARY.**—When a cause of action is for exemplary damages, such damages, and none other, can be recovered; and when the cause of action is for actual damages, only such damages can be recovered.

**DAMAGES—EXEMPLARY WHEN MAY BE RECOVERED.**—When a cause of action is an invasion of the rights or property of a person, natural or artificial, characterized by violence, fraud, malice, wantonness, or a reckless disregard of social or civil rights, exemplary damages may be recovered.

**DAMAGES—EXEMPLARY, WHEN ALLOWED.**—Exemplary damages are given by way of punishment for the wrong inflicted, and are not allowed for mere negligence, but only in cases where the wrong is wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of wantonness or willfulness. Actual malice need not exist or be proved to entitle the party wronged to exemplary damages.

**DAMAGES—EXEMPLARY, AGAINST CARRIER—WILLFUL WRONG OF SERVANT.**—The duty due from a common carrier to its passengers makes it liable in exemplary damages for the willful wrong of its servant, inflicted in the

course of his employment, unless the party wronged is guilty of contributory negligence.

**DAMAGES — EXEMPLARY FOR EXPULSION FROM TRAIN.** — When the cause of action against a railroad company to recover exemplary damages for ejecting plaintiff from a train is properly pleaded, and is supported by the evidence, the issue of exemplary damages should be submitted to the jury, under instructions that plaintiff is entitled to recover such damages for a willful and malicious invasion of his rights by the conductor of the company on the train.

**DAMAGES — EXEMPLARY — EVIDENCE.** — Where the complaint, in an action against a railroad company to recover exemplary damages for ejecting plaintiff from a train, alleges that his ticket was extended in time by the company's agent, under authority of a letter from another of its agents, and the answer admits an agreement to extend the time, as alleged, the letter, after identification, is admissible in evidence without proof of its execution.

**DAMAGES — EXEMPLARY — EVIDENCE OF CUSTOM.** — In an action against a railroad company to recover exemplary damages for the wrongful act of its conductor in ejecting plaintiff from a train, the custom of the company in regard to tickets may be proved by parol, but the consequence to the conductor if he violates such custom is immaterial, and proof thereof is inadmissible.

*T. P. Cothran*, for the appellant.

*E. B. Murray*, for the respondent.

POPE, J. Francis A. Spellman, the plaintiff, while having in his possession a ticket of the defendant, entitling him on its face to travel from Newberry to Anderson, in this state, at any time up to the 30th of June, 1889, was, on the fourth day of June, ejected from a passenger-car of the defendant by a conductor employed by defendant. This action was brought by him to redress said wrong. In his complaint, amongst other things, the plaintiff alleged: —

"2. That on the twenty-fifth day of May, 1889, the defendant sold the plaintiff a round-trip ticket from Anderson to Newberry and return over a portion of said railroad, so controlled and operated by it, for the sum of \$2.70, which sum plaintiff paid the defendant, by which ticket it contracted to convey the plaintiff in one of its passenger-cars from the city of Anderson, South Carolina, to the city of Newberry, South Carolina, and to carry him back to the said city of Anderson at any time up to May 31st of said year; that the said defendant, by direction of D. Cardwell, its division passenger agent, extended the time of the plaintiff in which to return, and on the fourth day of June, 1889, when plaintiff was ready to return, he presented the said ticket to the agent of the defend-

ant at Newberry, who changed the date of return on the ticket and returned it to plaintiff, representing that he had properly altered the ticket to enable plaintiff to return to Anderson upon the same; that upon the faith of such action, and pursuant to the conditions of said ticket, as so extended, the plaintiff, on said fourth day of June, as he had a right to do, entered the cars of said defendant, and started to return thereon to Anderson, South Carolina.

"3. That while he was such passenger, between the towns of Newberry and Ninety-Six, the conductor of said train, as the agent of the defendant, refused to carry the plaintiff on said ticket, and forcibly ejected him from said train; that in so doing the defendant committed an assault and battery of a high and aggravated nature upon the plaintiff by pulling him out off his seat down the aisle of said car, and forcibly pushing him off of the platform thereof in the presence of numerous passengers, and injured the reputation of the plaintiff by representing to them that he was trying to cheat the said company by attempting to ride upon a ticket which purported to be changed, but that such change was without the authority of the defendant, thereby charging plaintiff with attempting to perpetrate a fraud upon defendant, and imputing to him the crime of forgery." Wherefore he was damaged in his person and reputation two thousand dollars, for which he asked judgment.

In the answer of defendant, amongst other things, it is alleged: "Answering paragraph 2, it says it admits the purchase of the ticket as alleged, but denies that time of said ticket was extended, and admits that the time was agreed to be extended as alleged, and that it was not properly extended because of a mistake of defendant's agent at Newberry, but that said mistake was caused by negligence of plaintiff. 3. Answering paragraph 3 of complaint, defendant admits that defendant's agent refused to carry plaintiff, and ejected him, but denies that said agent was wrong in so doing, and denies that he committed an assault, or that he charged plaintiff with attempting to cheat the company, or attempting to perpetrate a fraud, or in any way imputed to him the crime of forgery. Defendant denies that the plaintiff has been damaged."

The action was tried upon these pleadings, and the testimony that was adduced at the hearing before Judge Norton and a jury, in the court of common pleas for Anderson County, on the 24th of December, 1890. Verdict for plaintiff for six

hundred dollars damages. After judgment thereon, defendant appealed upon the following grounds:—

1. Because the rule of exemplary damages was not applicable to this case under the testimony, and it is respectfully submitted that his honor erred in charging the jury that they might consider the question of exemplary damages in making up their verdict.

2. Because not only was the overwhelming weight of the testimony against the idea of influence or malice on the part of the conductor and other employees of the defendant, but there was absolutely no evidence whatever of willfulness or malice on their part, and such being the case, it is submitted that this court has the power to grant a new trial.

3. Because it is respectfully submitted that his honor erred in admitting the alleged Cardwell letter in evidence without legal proof of the execution of the same.

4. Because it is respectfully submitted that said letter was incompetent, even if it had been properly proved.

5. Because it is respectfully submitted that his honor erred in not allowing the witness Motte to testify as to whether or not the tickets presented to him by plaintiff were good in the condition in which they were when presented, said Motte being an expert.

6. Because even if said Motte had not been an expert, it is respectfully submitted that his testimony on said point was competent, if he knew of any rule invalidating such ticket.

7. Because it is respectfully submitted that his honor erred in not allowing the witness Motte to testify as to what would have been the consequences to him if he had received these tickets in the condition in which they were presented, without first making inquiry of the proper authorities.

8. Because his honor charged the jury: "We have heard nothing in the testimony in regard to a change of dates. That question seems to have been ignored, but only the testimony was offered as to what would be a proper form." While the witness Motte testified: "I told him (the plaintiff) that I could not take the ticket; that the date had been changed." And again: "I am not allowed to accept any ticket with an alteration on it like that." And again, he was asked: "You told him it was not good?" Answer: "Yes, sir." "It was not good because the dates had been changed?" Answer: "Yes, sir." And still again: "I told them that the date of the ticket had been changed, and he said he had orders, and I

asked him to show me the letter, and he said he could not do it."

The facts upon which both the plaintiff and defendant relied in the court below seem about these: The plaintiff and others from Anderson, desiring to attend a tournament to be participated in by the volunteer firemen at Newberry, procured from the defendant tickets that would be good to go and return from the 25th of May until the 31st of May, inclusive, such tickets being issued by defendant's agent at Anderson. While in Newberry, owing to the illness of one of the young men from Anderson, application was made to D. Cardwell, general division ticket agent of defendant, to extend the tickets beyond the 31st of May, so as to enable the holders to remain some days longer with the sick comrade. Mr. Cardwell wrote a letter authorizing the agent at Newberry to make the extension of the tickets. On the 4th of June, 1889, the plaintiff carried his own ticket and that of Mr. Sherard to such agent at Newberry to be extended. The extension was made, after the Cardwell letter was shown the agent, by such agent erasing the words and figures "31st of May" on such ticket, and indorsing thereon the words and figures "30th of June." At the same time this was done the plaintiff purchased tickets for his sick comrade and his attending physician.

The party of four entered on that day the passenger-coach of defendant to return to Anderson. Beyond Newberry, on the way to Ninety-Six, upon the request of the conductor, Mr. Motte, the plaintiff exhibited four tickets, two for the sick gentleman and his physician, and one each for himself and Mr. Sherard. The conductor objected to receiving the last two, upon the ground that the dates had been altered. He was promptly informed by the plaintiff that the change had been made by the agent at Newberry, under a letter of advice from Mr. Cardwell. The conductor asked to see this letter, but plaintiff told him it had been left at Newberry. The conductor then demanded the fare to be paid, or otherwise he would put them off. The plaintiff told him he did not have the money, but assured him the ticket was good, and that he could satisfy himself as to the same as soon as he reached a telegraph-office on the line of the road. The conductor proposed to take them to Ninety-Six if they would agree to pay him for their passage in case he learned there by telegram that the tickets were not good. They declined this proposition, protesting that the tickets were good. Thereupon the

conductor stopped the train, and forcibly ejected both of them (the plaintiff and Mr. Sherard), saying, "Come on, young man," as he seized him by the arm and carried him out of the car. All this occurred in the presence of a number of passengers. When ejected, it was raining, and not near a station. The passengers so ejected again entered the passenger-car of their own accord, and were carried to Ninety-Six, when the conductor learned that the extension of the tickets was made by the agent of the defendant.

There were questions raised on the trial as to what was the legal mode of extending tickets, and what responsibility a conductor assumes by accepting a ticket that is invalid under the rules of the railroad company. They may be considered hereafter. There was no motion made for a nonsuit. No written requests to charge were made to his honor the presiding judge. Some oral requests were made, to which he acceded, and seemingly satisfied both parties therewith, as we hear of no complaint from either party to the controversy as to such charge upon the matters embraced in such oral requests.

We will now examine the grounds of appeal. The leading questions raised by the appellant are embodied in the first and second grounds of appeal. In this way are suggested an inquiry by us,—1. As to the doctrine of exemplary damages, and what limitations there are affixed by law; and 2. If the circuit judge failed to correctly interpret this doctrine or improvidently allowed it, under the testimony adduced at the hearing, to be applied to the case at bar.

The cause of action in cases of exemplary damages is as clean cut as other different causes of action. Every cause of action is referable to some class; it is but a species of some particular group. For illustration, let us take the old form of action known as "trover," which was a generic name applied to those torts arising from one individual unlawfully converting any particular piece of personal property while the same was owned by another. Whenever these elements entered into and made up a cause of action, it was in "trover," and in such cases actual value of the property was the limit to the recovery; if the jury gave more, the verdict would be set aside: *Guerry v. Kerton*, 2 Rich. 507. So it is in those torts where the cause of action is the invasion of the rights of a person, natural or artificial, where such invasion is characterized by violence, fraud, malice, wantonness, reckless disre-

gard of social or civil rights, etc. And it is just as essential that such causes of action be properly pleaded as those belonging to any other class. If care is taken to observe this rule, very much of the confusion which exists as to this class of cases will be cleared up.

In reading some cases, we observe that the presiding judge, in his charge, speaks of the necessity of the jury only giving actual damages if they take one view of the case, and if they adopt another view of the same case, the jury must give exemplary damages. According to our view of the law, this is all wrong, for where a cause of action set up in the complaint is for exemplary damages, such exemplary damages, and none other, should be awarded; if the plaintiff fails by his proofs to establish such damages, the verdict should be for the defendant. Where the cause of action set up in the complaint is for actual damages, the plaintiff is entitled to recover nothing but actual damages. A different view would defeat the very object of pleadings. Of course, these observations are just as pertinent to the testimony offered in a case; it should always be restricted to that cause of action set up in the pleadings. In the case at bar, these requirements have been fully met by both plaintiff and defendant, both in the pleadings and proofs thereunder. The plaintiff here sues for exemplary damages, and the defendant meets him on that ground.

We do not know that we can better convey our apprehension of the doctrine of exemplary damages than by quoting a few text-writers and from a few decisions of the courts; but before doing so, it may not be amiss to give a slight reference to the history of the matter under discussion. The distinguishing feature of torts, as applied to legal actions, is, that they never arise *ex contractu*. Actions *ex delicto* and actions *ex contractu* are never mingled in the law. They ever stand apart. Actions for the redress of torts always sound in damages, and such damages may be either actual or exemplary. With the latter class we will deal just now. The full development of the law pertaining to this subject has not been without its struggles. There were those who felt that nothing like punishment should be admeasured on the civil side of the court, even in that class of offenses not provided for in the criminal code. So long as damages for torts were not to include the idea of punishment they were content. However, the opposing view at length generally prevailed. Both in England and in this country, courts administered this redress of wrongs by giving damages

as a compensation to the person affected as well as to punish the wrong-doer. Our own judicial history, in its early stages, bears witness to the adoption within our state borders of these principles of law. Nor has there been any deviation in this regard since the beginning. A long line of unbroken precedents, from our state reports, were cited by the present chief justice in delivering the judgment of this court in the case of *Duckett v. Pool*, 84 S. C. 323, re-enforced by apt quotations from the cases themselves.

This branch of the law was enlarged in its application, for at first it only applied to natural persons, but after a time, to meet the necessities resulting from our civilization and the rapid expansion in the industrial world, it was extended to corporations. This certainly was a stride for the law. Inasmuch as corporations are only artificial persons, deriving their existence alone from man, proverbially soulless, how could intention, *animus*, capacity to recognize good from evil, be ascribed to them? But so it has been held. The crimes of assault and battery of a high and aggravated nature, libel, slander, the lesser offenses of negligence, carelessness,—offenses in which the intent plays such a conspicuous part,—have all been ascribed to corporations, and when proved on trial, such corporations have been made to respond in heavy damages: *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 207; *Stevens v. Midland Counties R'y Co.*, 10 Ex. 356; *Whitfield v. Southeastern R'y Co.*, El. B. & E. 115. The foregoing were amongst the earliest cases in this direction. If either of the parties to this appeal should desire to read a fierce criticism of such a result, their attention is directed to the dissenting opinion of Mr. Justice Daniel, as found at pages 219–221 of 21 Howard's Reports. Since the beginning, however, there have been no steps backward in this policy of the law, as our own reports for the past twenty years will show.

Mr. Pierce, in his work on railroads, at page 305, says: "Such damages, exceeding compensation for the injury, are not allowed for mere negligence, and they are not confined to injuries which are intentional, or prompted by malice or an evil purpose, or caused by such willfulness or recklessness of conduct as raises a presumption of conscious indifference to the rights of others." Mr. Thompson, in his work on negligence, page 1254, says: "Exemplary, punitive, vindictive damages or smart-money, as they are called indifferently, are given by way of punishment of the wrong committed by the



defendant, and with a view of deterring others from like offenses. Whether or not the case is one that justifies exemplary damages is a question for the court to determine in its instructions to the jury. In the discharge of this duty the court looks to the *animus* of the defendant that accompanies the injury. If it was wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness, the court will instruct the jury that they are at liberty to find for the plaintiff, in addition to compensation for the injury actually sustained, such a sum as the circumstances justify."

In Wood's *Mayne on Damages*, 59, it is said: "But in order to warrant a jury in giving vindictive damages, something more than mere unlawfulness must be shown; there must be evidence of malice, fraud, wantonness, or oppression. Actual malice need not exist to entitle a party to punitive damages; if the act is wantonly or recklessly done, vindictive damages may be given, although there is no actual malice. Any act conceived in a spirit of mischief, or in evident disregard of the rights of others, or of civil or social obligations, come within the idea of a malicious act." The supreme court of the United States, in the case of *Philadelphia etc. R. R. Co. v. Quigley*, 21 How. 207, said: "In *Day v. Woodworth*, 13 How. 371, this court recognized the power of a jury, in certain actions of tort, to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in the rule is not merely the doing of an unlawful or injurious act. The word implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations."

The decisions of this court fully recognize the soundness of the foregoing quotations: *Palmer v. Charlotte etc. R. R. Co.*, 3 S. C. 597; 16 Am. Rep. 750; *Hall v. South Carolina R'y Co.*, 28 S. C. 261; *Quinn v. South Carolina R'y Co.*, 29 S. C. 381; *Duckett v. Pool*, 34 S. C. 323, and cases there cited. Thus it is manifest that our first statement of what is implied in the doctrine of our law regarding the scope and definition of exemplary damages was in every way faithful.

A few words as to any limitation in the application to cases when exemplary damages may be claimed. It should be re-

marked that natural and artificial persons are on the same footing. The law, however, increases the liability of common carriers somewhat when any antagonism arises between the conductors and passengers, growing out of an abuse of the power of the conductor; for the law holds the common carrier to a protection of the passenger, not only as against third persons, but as well as against its servants: *Goddard v. Grand Trunk R'y Co.*, 57 Me. 202; 2 Am. Rep. 39. In the case last cited, the court said: "It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. . . . He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori* against the violence and insults of his own servants."

One limitation to responsibility arises from contributory negligence of the plaintiff: *New Orleans etc. R. R. Co. v. Stat-ham*, 42 Miss. 607; 97 Am. Dec. 478. Another may be found in the fact that usually such liability must arise, where the tort-feasor is a servant, from acts done in the course of his employment: *Pierce on Railways*, 277. This doctrine is there laid down: "The company is liable for the acts of its servants in the course of their employment, both in the rightful use and in the abuse of the powers conferred upon them; and when they keep within the course of their employment, it is responsible for their negligence or wrongful act, although they are acting against its instructions or even willfully. This rule applies where the servant exercises a power conferred by the company on an occasion or under circumstances where its exercise is unlawful, as where a conductor or other servant, having the power to remove passengers from the company's carriages, who have no right to remain in them, removes a passenger who has such right": *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; 64 Am. Dec. 83. But time is too precious just now, in view of the other labors of this court, to pursue this branch of the inquiry any farther.

2. Let us see if the circuit judge here failed to correctly in-

terpret this doctrine, or improvidently allowed it, under the testimony here, to be applied to the case at bar. Under the decisions of this court, a circuit judge is bound to submit a case to the jury when there is any testimony to support the cause of action. Here, confessedly, was an action as framed by the pleadings for exemplary damages, and if there was any testimony given in support of this, the circuit judge was powerless; the responsibility was upon the jury. We have examined the "case," and we see no error in the trial judge in this regard. Nor are we dissatisfied with his charge of the law relating to exemplary damages. No requests to charge were made that he failed to meet. As to the request addressed to us to grant a new trial because of the absence of testimony, it must be denied, because we cannot so conclude in the face of the trial judge's action, or in the face of the testimony itself. We must dismiss these two grounds of appeal.

As to the third ground of appeal. We fail to find any merit here. The plaintiff in his complaint referred to Mr. Cardwell's considerate interference in his behalf, by giving directions for the extension of the tickets by defendant's agent at Newberry. The defendant in his answer admits "that the time was agreed to be extended as alleged." The witness Spellman in his testimony states that the ticket agent at Newberry said, "Have you not a letter from Mr. Cardwell?" and "I presented this this letter to him." The agent at Newberry acted on this letter. It was fully identified at the trial, and did not need any proof as to its execution, though that was done, in a manner, by the witness Brock. It was a fact that this letter, purporting to be a letter from D. Cardwell, was used, and from this standpoint it was admissible without any regard to proof of its execution. This ground of appeal must be dismissed.

Now as to the fourth ground of appeal. The letter of D. Cardwell was pertinent to the inquiry in the court below, because it had become inseparably interwoven with the transactions. For the reasons set out in considering the third ground of appeal, this exception must be overruled.

As to the fifth, sixth, and seventh grounds of appeal. Inasmuch as they all relate to the witness Motte, we will consider them in a group. Is it a fact that Motte did not testify as to whether the tickets were good in the condition presented to him for acceptance, or that he was not allowed to testify because no expert, or that he did not testify as to what consequences would be visited upon him if he had accepted the

tickets? The first two of these questions might be answered by this court by simply reading the words of the appellant set out in its eighth ground of appeal. But the case speaks for itself. The only exception taken by appellant to any ruling of the circuit court on the matter of Motte's testimony arose in this way: the question was presented as to whether, if a witness is asked if a ticket as extended is good, and he declares that there is a printed rule regulating such extensions, and such printed rule is not produced, he can answer that question. The court ruled that he could not, and the court was right. But fortunately for the defendant, it afterwards occurred to this witness that he was mistaken as to the existence of any such printed rule,—that it was only a custom. And he testified fully. The only hindrance was when the question was asked, "What would have been the result of this ticket?" Plaintiff objected, which objection was sustained, and defendant accepted. This objection was well taken. How could this witness tell what would take place in the future in the conduct of any one else? These grounds of appeal must be dismissed.

So far as the eighth ground of appeal is concerned, we feel that it has arisen from a misconception by the appellant of the judge's meaning when he used the language complained of: "We have heard nothing in the testimony in regard to a change of dates; that question seems to have been ignored, but only the testimony was offered as to what would be a proper form." It is evident the judge could not have intended to state what the pleadings admitted that the words "31 May" had been changed and "30 June" inserted on the tickets. The only contention here was to the effect of this change. The witness Spellman in his testimony explained it. And the witness Motte also spoke of it. What the judge meant was, that no contest existed in the testimony as to the change of the dates; that the only contest on that line was as to the proper form of the extension of a ticket. That this is the true explanation, read from the judge's charge: "You are to judge from that testimony whether this ticket was in the form required, whether any particular form was required, and whether, if no particular form was required, it is sufficient to indicate to the conductor or any one else that the holder was entitled to pass over the road on the date which is written upon it after the first riding, that is, on June 4th." The first riding had been on the 25th of May. The rule here is, that the

whole charge must be considered, and not extracts made therefrom here and there. It is very evident that no influence detrimental to appellant could have arisen by the use of this language by the judge, especially as immediately afterwards he let his true meaning appear. This ground of appeal must be dismissed.

It is the judgment of this court that the judgment of the circuit court be affirmed.

McIVER, C. J. While not assenting to all of the general observations found in this opinion, I concur in the result. It is also due to Mr. Justice Pope that attention should here be directed to the correction or modification of what seems to be an approval of the doctrine stated in the quotation from Thompson on Negligence, 1254, made by him in the opinion filed at the present term in the case of *Samuels v. Richmond etc. R. R. Co.*, 35 S. C. 493, *post*, p. 883, prepared by the same justice.

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**DAMAGES — PLEADING — WHETHER COMPLAINT MUST STATE KIND SOUGHT.** — Where the amount of the damages is stated, the plaintiff may recover punitive damages, though they are not so styled in his complaint: *Southern E. Co. v. Brown*, 67 Miss. 260; 19 Am. St. Rep. 306, and note.

**EXEMPLARY OR PUNITIVE DAMAGES.** — In at least two notes in the American Decisions the subject of exemplary or punitive damages is considered, and many of the authorities bearing upon it cited: Note to *Merrills v. Tariff Mfg. Co.*, 27 Am. Dec. 684-689; note to *Austin v. Wilson*, 50 Am. Dec. 767-775. While we deem it worthy of further consideration, we shall not make any attempt to go over the entire ground, but, for the most part, shall confine our attention to the decisions pronounced since those notes were written, and to noticing some topics not considered in them.

**Cases Sustaining.** — In the notes of which we have spoken, reference was made to the fact that there is a dispute as to whether or not punitive or exemplary damages are allowable, and that those who deny the right to recover such damages nevertheless admit that in many instances damages are recoverable which are not subject to precise computation, and the amount of which must rest very largely in the discretion of the jury, so that it is often difficult to decide whether the controversy over the subject is, after all, anything beyond a controversy over the use of terms intended to express substantially the same idea. The courts which declare in direct terms that exemplary or punitive damages are recoverable are still in a very decided majority: *Louisville etc. R'y Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600; *Borland v. Barrett*, 76 Va. 128; 44 Am. Rep. 152; *Head v. Georgia etc. R'y Co.*, 79 Ga. 358; 11 Am. St. Rep. 434; *Bundy v. Maginess*, 76 Cal. 532; *International etc. R'y v. Telephone etc. Co.*, 69 Tex. 277; 5 Am. St. Rep. 45; *Sullivan v. Oregon R. & N. Co.*, 12 Or. 392; 53 Am. Rep. 364; *Day v. Holland*, 15 Or. 464; *Oakill v. Murphy*, 94 Cal. 29; *ante*, p. 88; *Jefferson Co. S. B. v. Eborn*, 84 Ala. 529; *Bates v. Callendar*, 3 Dak. 256; *Harrison v. Ely*, 120 Ill. 83; *Bisford v. Young*, 115 Ind. 174; *Thill v. Pohlman*, 76 Iowa, 638; *Root v. Sturdivant*, 70 Iowa, 55; *Webb v. Gilman*, 80 Me. 177; *Peck v. Small*, 35 Minn. 465; *Higgins*

*v. Louisville etc. R. R.*, 64 Miss. 80; *Haines v. Schultz*, 50 N. J. L. 481; *Harmann v. Cundiff*, 82 Va. 239; *Spear v. Hiles*, 67 Wis. 330; *Hitchler v. Voelker*, 8 Mo. App. 492; *Goldsmith v. Joy*, 61 Vt. 488; 15 Am. St. Rep. 923.

*Cases Denying the Right to Recover.* — Without stopping to give the cases just cited any special attention, we shall refer to some of the recent decisions denying the propriety of punitive damages, for the purpose of ascertaining, if we can, to what extent an aggrieved party is entitled to recover within the rules sanctioned by such decisions.

The statute of West Virginia gave every wife a cause of action against persons selling or furnishing spirituous liquors to her husband, and authorized her to recover "as well for all such damages as plaintiff has sustained by reason of the selling or giving such liquors as for exemplary damages"; but the courts of the state determined that "by exemplary damages is meant, not additional damages given as a punishment of the defendant for selling intoxicating liquors to her husband illegally, but damages which not only compensate her for injury to her means of support, but also, in a proper case, damages which shall compensate her for her mental anguish": *Pegram v. Storts*, 31 W. Va. 220. In a later case, the question arose what damages might be recovered for an assault and battery. The trial court instructed the jury that plaintiff "was only entitled to compensation for such injuries as he may have shown from the evidence were caused by the assault," and that he must not be "given any damages except for loss of time, expense of nursing, and medical attendance." The appellate court regarded this instruction as erroneous, saying that while damages would not be imposed in a civil cause as a mere punishment, "it by no means follows that in an action for an injury wantonly inflicted by one person upon another, the damages are confined to the mere making good the pecuniary loss which the injured party has suffered, — as his loss of wages for the time he was disabled, and the expenses of nursing and medical attendance, — for he is not only entitled to recover for these, but for the physical injury received and the physical suffering endured; but the jury may, in addition to this, compensate him for the mental anguish, shame, and dishonor which he has suffered": *Beck v. Thompson*, 31 W. Va. 459; 13 Am. St. Rep. 870. A later case in the same state apparently sanctions the allowance of exemplary damages in cases in which "gross fraud, malice, or oppression, or any wanton, willful, and deliberate disregard of the injured person's rights, appears": *Gillingham v. Ohio River R'y Co.*, 35 W. Va. 588, 600; 29 Am. St. Rep. In Colorado, though the question before the court was whether or not punitive damages might be awarded when the wrong complained of was punishable as a crime, the court considered the general question of the propriety of such damages in any case, and reached the conclusion that they were not allowable on principle, and that as the court was free to adopt such rule upon the subject as it thought most conformable to reason, it would deny the right to have punitive damages awarded as a punishment to the wrongdoer; but in explaining what it meant by compensatory damages which it deemed allowable, the court said: "A misapprehension seems sometimes to exist as to the word 'compensatory,' when used in this connection. Under the rule limiting them to compensatory damages, juries will, with proper instructions, recognize a broad distinction between a tort unaccompanied by malice, or circumstances of aggravation or disgrace, and one producing equal direct pecuniary damage where either of these conditions exist. In the former case they consider only the actual injury to the person or property, including expenses, loss of time, bodily suffering, etc., occasioned by the wrongful act; in the latter, they allow such additional sum as in their judg-

ment is warranted by the circumstances of contumely, anguish, or oppression; but in both instances the damages are awarded as compensation; the additional sum is given to the individual as a recompense for the mental suffering or wounded sensibilities, etc., as the case may be. It often happens that this constitutes the principal element of the recovery. If upon a crowded thoroughfare one maliciously assaults me with blows and epithets, five dollars may fully compensate the injury inflicted to my person and clothing; but five hundred dollars may be utterly inadequate to requite the sense of insult, the personal indignity, the public disgrace and humiliation. The extra five hundred dollars exacted may operate indirectly as a punishment; it may constitute an example to others, and also deter my assailant himself from repetitions of the offense in future; in law, however, it is simply compensation for the private wrong; a kind of indemnity which probably no court has ever refused to allow when warranted by the circumstances. But under the doctrine of exemplary damages as announced by the instruction given in this case, the jury are not required to stop with the five dollars for material injury, and five hundred dollars for lacerated feelings. They may turn to the domain of criminal law, and consider the public wrong; and they may add one thousand dollars more as a punishment to my assailant. The arrangement is highly satisfactory to me, since I have the pleasure of pocketing the additional thousand dollars, to which I am not entitled. But as we have already seen, it hardly comports with correct legal principles. The case at bar furnishes a good illustration of the doctrine under discussion. The jury are told that if they find certain facts to exist, they may award damages to plaintiff for, — 1. The actual pecuniary loss sustained; 2. The peril occasioned in regard to personal liberty; 3. The injury to his person and liberty; 4. The injury to his feelings and reputation; 5. The punishment of defendant. The first four items comprise all the injuries for which plaintiff ought to recover; they all rest upon the theory of compensation for the private wrong, and are therefore in perfect harmony with the principles and procedure in civil actions; they furnish ample ground for discrimination by the jury, should they find the prosecution and imprisonment to have been malicious. Why not remit the punishment of defendant to a criminal forum?" *Murphy v. Hobbs*, 7 Col. 541; 49 Am. Rep. 366; *Greeley etc. R'y Co. v. Yeager*, 11 Col. 345.

In Michigan, in an action against an officer for seizing and selling property alleged to be exempt from execution, the trial court instructed the jury that if the seizure was willful, malicious, and wanton, or accompanied with insulting or abusive language and deportment, exemplary or punitive damages might be given. The appellate court, after objecting to these instructions on the ground that there was no evidence in the case calling for them, added: "But the principal fault in the instructions is to be found in the distinct presentation of the idea that the jury, after estimating the actual damages of the defendant, might go further, and give a further sum, limited only by their discretion, by way of punishment and example. That all the circumstances attending a willful trespass or other wrong may be given in evidence to the jury and taken into account in estimating damages, is a familiar principle. Sometimes the damages which the jury are allowed to give in addition to those which measure the actual injury by a money standard are spoken of as exemplary damages; but unless this term is properly explained, there is great danger that it will mislead the jury, in supposing that after compensating the plaintiff to the full extent of his injury, they may proceed to punish the defendant with unlimited discretion. . . . The purpose of an action of tort is

to recover the damages which the plaintiff has suffered from the injury done him by the defendant. In some of the cases the damages are incapable of pecuniary estimation, and the court performs its duty in submitting all the facts to the jury in leaving them to estimate plaintiff's damages as best they may under all the circumstances. In other cases there may be a partial estimation of damages by a money standard, but the invasion of the plaintiff's rights has been accompanied by circumstances of peculiar aggravation which are calculated to vex and annoy the plaintiff, and to cause him to suffer much beyond what he would have suffered from a pecuniary loss. Here it is manifestly proper that the jury should estimate the damages with the aggravating circumstances in mind, and that they should endeavor fairly to compensate the plaintiff for the wrong he has suffered. But in all cases it is to be distinctly borne in mind, that compensation to the plaintiff is the purpose in view, and any instruction which is calculated to lead them to suppose that besides compensating the plaintiff they may punish the defendant is erroneous": *Stilson v. Gibbs*, 53 Mich. 280. In an action for a malicious prosecution, the same court said: "It is not necessary to repeat the distinction. It is summed up by saying, that the purpose of an action of tort is to recover the damages which the plaintiff has suffered from the injury done by the defendant; that compensation to the plaintiff is the purpose in view; and when that is accorded, anything beyond, by whatever named called, is unauthorized. It is not the province of the jury, after such damages have been found for the plaintiff so that he is fairly compensated for the wrong committed by the defendant, to mulct the defendant in an additional sum, to be handed over to the plaintiff, as a punishment for the wrong he has done to the plaintiff"; *Wilson v. Bowen*, 64 Mich. 133. Intermediate the two decisions last cited was another by the same court, which seemed to sanction the awarding of punitive damages, though called by another name. The action was for a malicious prosecution and arrest, and the trial court instructed the jury that there were two kinds of damages, actual and added, and after defining actual damages, said: "But beyond actual damages, the law gives what are called 'added' damages. Those grow out of the wantonness or atrocity of the act. Those are given where an act is so wanton, so despotic, of so oppressive a character, or where it entails such shame, such publicity, upon the party as to have the effect of exciting his feelings more than an act committed under less wanton, less oppressive, circumstances. In such cases the law says the damages should be greater, because the injury to the feelings is greater." This instruction was approved upon appeal, the appellate court remarking that "actual damages are those which the injured party is entitled to recover for wrongs received and injuries done when none were intended. Damages beyond these, where the injuries and sufferings were intended, or occur through carelessness or negligence amounting to a wrong so reckless and wanton as to be without palliation or excuse, are frequently and properly given, and have been variously designated by the terms above mentioned. The first are measured by known and well-defined rules. No rule can be laid down, properly measuring or limiting the damages allowable in the other class of cases, except they must not be oppressive, or such as to shock the common sense of fair-minded men; and they are therefore left to the reasonable discretion of the jury. A more definite rule cannot well be given as to these, as what would be right and just must depend entirely upon the circumstances of each particular case": *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608. In a more recent case, the general declaration was made, that "where actual malice is shown, in an action for slander, the jury may always give exemplary dam-



ages": *Newman v. Stein*, 75 Mich. 402; 13 Am. St. Rep. 447. From these apparently conflicting opinions, we find it impossible to decide whether or not, at the present time, punitive damages are or are not allowable in Michigan, except in actions brought to recover damages resulting to a wife from selling intoxicating liquors to her husband, in which class of cases statutes have been enacted declaring that plaintiff "shall have the right to recover actual and exemplary damages": *Larzelere v. Kirchgesser*, 73 Mich. 276; *Peacock v. Oaks*, 85 Mich. 578. Perhaps, however, the doubt respecting the position of the courts of Michigan is removed by the decision of the supreme court of that state, in June, 1892, in *Stuyvesant v. Wilcox*, in which the court said: "But this court has never held that one should be compelled to pay 'smart-money' as exemplary damages, or any damages, by way of punishment merely. Damages to be awarded can never exceed what shall compensate the injury done. Compensation to the plaintiff is the purpose in view, and any instruction which may lead the jury to suppose that they have the right to go beyond that, and that they may punish the defendant by compelling him to pay 'smart-money,' is erroneous."

In Nebraska the allowance of exemplary damages is not permitted. "Damages should be equal in amount to the injuries sustained; in law, the injured party, upon being paid the damages sustained by the injury, has received full compensation therefor. Why, then, should the property of the party causing the injuries be taken from him and given to another without compensation? Constitutional guaranties of the rights of private property amount to but little if courts sanction its practical confiscation in the name of exemplary or punitive damages. And the effect of permitting the jury to give exemplary damages is to allow them to return a verdict for such sum as their prejudice or caprice may prompt them to do without regard to the amount of the injury. If it is said that these damages are imposed as a punishment, it is a full and sufficient answer to say that the state inflicts punishment, and not individuals"; *Riese v. McCormick*, 11 Neb. 261.

*Classes of Cases in Which Allowable.*—Exemplary or punitive damages, in the states where they are recoverable, are limited, with few exceptions, to actions for injuries resulting from torts. They are not recoverable in equity, under any circumstances. Though courts of equity are often called upon to ascertain and award compensation for injuries suffered by a complainant, he is deemed, by his resort to equity, to have waived any claim he may have had to exemplary damages: *Bird v. Wilmington etc. R. R. Co.*, 8 Rich. Eq. 46; 64 Am. Dec. 739; *Sanders v. Anderson*, 10 Rich. Eq. 232. In an action to recover compensation for a breach of contract to marry, punitive damages are undoubtedly recoverable: *Chellis v. Chapman*, 125 N. Y. 214; *Houston etc. R. R. Co. v. Shirley*, 54 Tex. 125. This action, though based upon contract, and in a form appropriate for the recovery for a breach of contract, is, nevertheless, treated, with respect to the damages recoverable, as an action of tort, and exemplary damages may be given or withheld upon the same considerations which would operate in actions of tort: *Thorn v. Knapp*, 42 N. Y. 474; 1 Am. Rep. 561; *McPherson v. Ryan*, 59 Mich. 33; *Johnson v. Jenkins*, 24 N. Y. 252. In some instances in which the condition of a bond has been broken by the commission of a tort, under such circumstances as would justify the awarding of exemplary damages had the action been in tort, such damages have been allowed in actions upon the bond: *Floyd v. Hamilton*, 33 Ala. 235; *Richmond v. Shickler*, 57 Iowa, 486; *Renkert v. Elliott*, 11 Lea, 235; but other courts, with perhaps the better reasoning, have denied such damages when the actions were based upon bonds: *Cobb v. People*, 84 Ill. 511; *McClendon v. Wells*, 20 S. C.

514. Except in the instances mentioned, it is believed that exemplary damages have never been sustained in actions upon contracts.

*Death of Wrong-doer Destroys Right to.* — The only ground upon which the allowance of exemplary damages has been defended is, that it is proper and right to make such allowance, to punish a wrong-doer, and thus deter him from the commission of like wrong in the future. If, however, he is no longer living, he cannot be punished by any earthly court or judgment, neither is there any necessity to do anything to deter him from committing any further wrong, and therefore the only possible reason for the awarding of exemplary damages for a wrong done by him has ceased to exist. Such being the case, though the cause of action survives him, punitive damages will not be awarded against his heirs or other representatives: *Sheik v. Hobson*, 64 Iowa, 146; *Edwards v. Ricks*, 30 La. Ann. 926; *Ripley v. Miller*, 11 Ired. 247; *Wright v. Donnell*, 34 Tex. 291; *Hewlett v. George*, 68 Miss. 703.

*Against Minors and Persons of Unsound Mind.* — Another result of the doctrine that punitive damages are given only as a punishment to a wrong-doer is, that they should not be awarded except when he is in a mental condition rendering it possible for him to do a conscious and deliberate wrong. Therefore, though an insane person is, by a majority of the authorities, liable for torts committed by him, yet he is not subject to punishment therefor, and the person injured must content himself with compensatory damages only: *McIntyre v. Sholty*, 121 Ill. 660; 2 Am. St. Rep. 140; *Morse v. Crawford*, 17 Vt. 499; 44 Am. Dec. 349; *Behrens v. McKenzie*, 23 Iowa, 333; 92 Am. Dec. 428. A like rule must, upon principle, be applicable to infants, as where, owing to their tender years and mental immaturity, they, in the opinion of the jury, acted without being able to understand the consequences of their action and without wrongful intent, the damages recoverable from them must be limited to mere compensation for the injuries sustained therefrom: *Cooley on Torts*, 2d ed., 120. And even though an infant wrong-doer was aware of the nature and consequences of his acts, and was moved thereto by malice and a desire to injure, doubtless his age and probable want of mature judgment, and of ability to exercise proper restraint over his evasions, ought to be considered by the jury in determining whether and to what extent they will punish him by the exaction of exemplary damages: *O'Brien v. Loomis*, 43 Mo. App. 29.

*Absence of Intention to do Wrong — Provocation, etc.* — Because exemplary damages are given only by way of punishment to an evil doer, all circumstances tending to prove that he was without evil design, or though such design is admitted, to mitigate its existence, are admissible in evidence, either to show that punitive damages should not be allowed, or if allowed, that they should be more restricted than if he had acted without provocation and in the absence of mitigating circumstances. Hence, for the purpose of showing that none but compensatory damages should be allowed, evidence is admissible to prove that the wrong complained of was the result of accident, or was committed unintentionally: *Walker v. Fuller*, 29 Ark. 448; *Tripp v. Grouner*, 60 Ill. 474; *Waller v. Waller*, 76 Iowa, 513; *Jackson v. Schmidt*, 14 La. Ann. 818; *Blodgett v. Brattleboro*, 30 Vt. 579; or through an honest mistake: *Walker v. Fuller*, 29 Ark. 448; *Sapp v. Northern C. R'y Co.*, 51 Md. 115; or that the wrong-doer, in all that he did, acted in good faith and without recklessness or evil design: *St. Peter's Church v. Beach*, 26 Conn. 355; *Tracy v. Swartwout*, 10 Pet. 80; *Plummer v. Harbut*, 5 Iowa, 308; *Pierce v. Getchell*, 76 Me. 216; *Fitzgerald v. Chicago, R. I. & P. R'y Co.*, 50 Iowa, 79; *Philadel-*

*phia etc. R'y Co. v. Horstich*, 62 Md. 300; 50 Am. Rep. 223; *Logan v. Hannibal etc. R'y Co.*, 77 Mo. 663; *Yates v. New York etc. R'y Co.*, 67 N. Y. 100.

Therefore, for the purpose of establishing his good faith, the defendant is entitled to prove that he consulted counsel learned in the law and of good repute: *City N. B. v. Jeffries*, 73 Ala. 183; *Cochrane v. Tuttle*, 75 Ill. 361; *Bonesteel v. Bonesteel*, 30 Wis. 511; or a person whom he believed in good faith to be an attorney, though such belief was erroneous: *Murphy v. Larsen*, 77 Ill. 172; and acted upon the advice of the person so consulted; but the effect of such showing is destroyed when it appears that the attorney, or supposed attorney, before his advice was taken, was not correctly informed of all the facts within the knowledge of the defendant, or that, though such information was given, the defendant did not act in accordance with the advice received: *Carpenter v. Barber*, 44 Vt. 441; *Shores v. Brooks*, 81 Ga. 468; 12 Am. St. Rep. 332. Where the act complained of is conceded to have been intentional and wrongful, the defendant may nevertheless prove the provocation under which he acted, provided that it was so recent that his act may be deemed to have been the result of it, and of the sudden heat of passion engendered by it: *Cushman v. Waddell*, 1 Bald. 57; *Ward v. Blackwood*, 41 Ark. 295; 48 Am. Rep. 41; or that the injuries complained of were inflicted in a combat entered into between plaintiff and defendant by their mutual consent: *Shay v. Thompson*, 59 Wis. 540; 48 Am. Rep. 538; but provocation received so long prior to the commission of the wrong complained of that the passion roused by it has had time to abate is not admissible, even in mitigation of exemplary damages: *Haftalin v. Misner*, 70 Ill. 55.

*Against Principals and Masters for Acts of Servants and Agents.* — The principle upon which the awarding of exemplary damages is usually justified would seem to exonerate principals and masters from liability from anything beyond compensatory damages for wrongs committed by their servants or agents without any complicity on their part, and in the absence of any want of due care in the selection of such servants or agents; for, in such cases, if punishment is inflicted, it must be borne by one guilty of no evil intent or want of care. Perhaps in the majority of cases in which the wrong-doer was a natural person acting by his agent or servant, he has not been held answerable in exemplary damages for the fraud, malice, or oppression of such agent or servant which he neither previously authorized nor subsequently ratified; *Mendelsohn v. Anaheim L. Co.*, 40 Cal. 657; *Pollock v. Gantt*, 69 Ala. 373; 44 Am. Rep. 519; *Eviston v. Cramer*, 57 Wis. 570; *Grund v. Van Vleck*, 69 Ill. 478.

*As Corporations cannot act otherwise than by their agents, they must either be held liable in exemplary damages for the acts of their agents, or the recovery against them for wrongful acts must in all cases be limited to compensatory damages, and there are many authorities which declare that a corporation can in no event be liable in exemplary damages for the malicious, fraudulent, reckless, or oppressive acts of its servants or agents, unless such acts were previously authorized or subsequently ratified by the corporation, or it retains the agent in its employment after knowledge of his bad conduct, or has not exercised proper care in choosing him or in retaining him in its service:* *Ricketts v. Chesapeake etc. R'y Co.*, 33 W. Va. 433; 25 Am. St. Rep. 901; *Cleghorn v. New York etc. R. R. Co.*, 56 N. Y. 44; 15 Am. Rep. 375; *Hagan v. P. & W. R. R.*, 3 R. I. 88; 62 Am. Dec. 377; *International & G. N. R. R. v. Garcia*, 70 Tex. 207; *Great W. R'y Co. v. Miller*, 19 Mich. 305; *Ackerson v. Erie R'y Co.*, 32 N. J. L. 254; *Sullivan v. Oregon R'y & N. Co.*, 12 Or. 392; 53 Am. Rep. 364; *Keil v. Chartiers V. C. Co.*, 131 Pa. St. 466; 17 Am. St.

Rep. 823; *Texas etc. R'y Co. v. Johnson*, 75 Tex. 158. A decided majority of the American cases at the present time, however, dissent from this conclusion; and whenever the act of the agent or servant of a corporation is so far within the line of his duty that his principal is answerable therefor, he is regarded as representing the corporation in the motives from which he acts and in the manner of his action, and therefore the corporation is answerable in exemplary damages if the act of the servant was malicious, reckless, or oppressive, and in every other instance in which the principal would have been answerable in such damages had it previously authorized or subsequently ratified the wrong done by its servant or agent: *Southern Exp. Co. v. Brown*, 67 Miss. 260; 19 Am. St. Rep. 306; *Louisville & N. R. R. Co. v. Garrett*, 8 Lea, 438; 41 Am. Rep. 640; *Atlantic & G. W. R'y Co. v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Quinn v. South Carolina R'y Co.*, 29 S. C. 381; *Wheeler & W. Mfg. Co. v. Boyce*, 36 Kan. 350; 59 Am. Rep. 571; *Louisville & N. R'y Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600; *Spellman v. Richmond etc. R'y Co.*, 35 S. C. 475; ante, p. 858; *Hanson v. European & N. R'y Co.*, 62 Me. 84; 16 Am. Rep. 404; *Goddard v. Grand T. R'y Co.*, 57 Me. 202; 2 Am. Rep. 39; *Hart v. Charlotte etc. R. R. Co.*, 33 S. C. 427; *Citizens' S. R'y Co. v. Steen*, 42 Ark. 321; *Georgia R. R. Co. v. Olds*, 77 Ga. 673; *Baltimore & Y. T. v. Boone*, 45 Md. 344; *Philadelphia, W., & B. R. R. v. Larkin*, 47 Md. 155; 28 Am. Rep. 442. This rule has been applied against carriers of passengers more frequently than in any other class of cases, and in nearly every instance in which a passenger has been unlawfully ejected from a railway car in an insulting manner, or with circumstances of unnecessary violence or wantonness, indicating malice on the part of the servant representing the carrier, or a reckless disregard of consequences and of the rights and feelings of the person ejected, the corporation has been held answerable in punitive damages: *Citizens' S. R'y Co. v. Steen*, 42 Ark. 321; *Hanson v. European & N. R'y Co.*, 62 Me. 84; 16 Am. Rep. 404; *Louisville & N. R. R. Co. v. Ballard*, 85 Ky. 307; 7 Am. St. Rep. 600; *Quinn v. South Carolina R'y Co.*, 29 S. C. 381; *Atlantic etc. R'y v. Dunn*, 19 Ohio St. 162; 2 Am. Rep. 382; *Louisville & N. R. R. Co. v. Garrett*, 8 Lea, 438; 41 Am. Rep. 640; *Southern Exp. Co. v. Brown*, 67 Miss. 260; 19 Am. St. Rep. 306. Municipal corporations are not subjected to the same rules upon this subject as private corporations, and the damages recoverable against them for the wrongful acts of their servants and other agents seem in all cases to be limited to mere compensation for injuries sustained: *Larsen v. Grand Forks*, 3 Dak. 307; *Chicago v. Langlass*, 52 Ill. 256; 4 Am. Rep. 603; *Chicago v. Jones*, 66 Ill. 349; *Wilson v. Wheeling*, 19 W. Va. 323; 42 Am. Rep. 780. If a partnership is answerable for a tort committed by one of its members, and for which he is liable to exemplary damages on the ground of his malice, wantonness, recklessness, or oppression, exemplary damages may be recovered of the partnership: *Robinson v. Goings*, 63 Miss. 500.

*Negligence, Exemplary Damages for.* — Though negligence is a tort, and may, in proper cases, warrant the imposition of exemplary damages, such cannot be the case when it consists merely of a want of ordinary care: *Western Union Tel. Co. v. Way*, 83 Ala. 542; *McFee v. Vicksburg etc. R'y Co.*, 42 La. Ann. 790; *International etc. R'y Co. v. Brazil*, 78 Tex. 314; *Louisville etc. R. R. Co. v. Shanks*, 94 Ind. 598; *Parsons v. Missouri etc. R. R. Co.*, 94 Mo. 286; *Augusta Factory v. Barnes*, 72 Ga. 217; 53 Am. Rep. 838; *Chattanooga etc. Co. v. Liddell*, 85 Ga. 482; 21 Am. St. Rep. 169; *Chicago etc. R. R. Co. v. O'Connell*, 48 Kan. 581; *Atkinson etc. R. R. Co. v. McGinnis*, 46 Kan. 109; *Missouri Pac. R. R. Co. v. Johnson*, 72 Tex. 95. If the negligence is gross,

the rule is otherwise. Therefore, if the defendant has been guilty not only of want of ordinary care, but of negligence so gross as to justify the conviction on the part of the jury that he acted wantonly or willfully, or with a conscious indifference to consequences or to the safety of the person whom his negligence might probably expose to injury, then exemplary damages may properly be awarded against him: *West v. Western Union Tel. Co.*, 39 Kan 93; 7 Am. St. Rep. 530; *Kansas City etc. R. R. Co. v. Daughtry*, 88 Tenn. 721; *Purcell v. Richmond etc. R. R. Co.*, 103 N. C. 414; *Patterson v. South etc. R. R. Co.*, 89 Ala. 318; *Louisville etc. R. R. Co. v. Mitchell*, 87 Ky. 327; *contra*, *Yerlin v. Linklater*, 80 Cal. 135; *Alabama etc. R. R. Co. v. Hill*, 90 Ala. 75; 24 Am. St. Rep. 764; *South etc. R. R. Co. v. McLendon*, 63 Ala. 266; *Citizens' etc. R'y Co. v. Steen*, 42 Ark. 321; *Wilkinson v. Dreis*, 75 Me. 360; *Pittsburgh etc. R. R. Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517. In one instance in which the jury was charged, in general terms, that they might give punitive damages if they should find that the injuries complained of "were the result of gross negligence on the part of defendant's agents," the charge was disapproved, because there were no facts authorizing the instruction upon this subject, and because "exemplary damages are only allowed where a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct. There must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences": *Railway Company v. Lee*, 90 Tenn. 570. When one sues for injuries suffered on a railway because of the condition of its track, arising from the use of old rails and cross-ties, shows facts from which the jury is authorized to infer "that the defendant knew of this condition of things, and to impute to them such recklessness or wantonness as is the equivalent of conscious wrong-doing in continuing to run trains over a track in such a dangerous condition," punitive damages may be imposed: *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; *Richmond etc. R. R. Co. v. Vance*, 93 Ala. 144.

*The General Grounds of Allowance of.*—In the great majority of instances, in which torts are committed for which the wrong-doer must respond in damages, the recovery against him must be limited to the actual injury inflicted by him. Before he can be properly punished by the imposition of punitive damages, it must appear from the evidence, to the satisfaction of the jury, either that the unlawful act which he did was done for the purpose of injuring another, or without caring whether any one was injured or not: *Nordhaus v. Peterson*, 54 Iowa, 68. Unless cases where one is answerable in exemplary damages for gross negligence may be regarded as exceptions to the rule, there is no wrong for which these damages may properly be allowed, unless it may fairly be attributed to bad motives on the part of the person guilty of it: *Miller v. Kirby*, 74 Ill. 242; *Becker v. Dupree*, 75 Ill. 167; *Moore v. Cross*, 43 Ind. 30; *Brown v. Allen*, 35 Iowa, 306; *Elliott v. Hers*, 29 Mich. 202. The ordinary, and perhaps the only, grounds for the awarding of punitive damages are malice, oppression, recklessness, and perhaps fraud: *Oady v. Case*, 45 Kan. 733; *Kelly v. McDonald*, 39 Ark. 387; *Day v. Holland*, 15 Or. 464; *Wentworth v. Blackman*, 71 Iowa, 255; *Webb v. Gilman*, 80 Me. 177. It has been said that a defendant may be liable for exemplary damages, though he did not act maliciously, and that malice is but one of the several grounds for the allowance of such damages: *St. Ores v. McGlashen*, 74 Cal. 148. This, we think, is a mistaken view. For while some of the statutes and decisions speak of other grounds, these grounds, unless we except recklessness, are but the ordinary manifestation of malice, and from the existence of which malice

is always presumable. Thus wantonness, oppression, insult, brutality, use of excessive force, and the like, while they are often correctly mentioned as grounds for awarding punitive damages, are clearly but evidence from which malice ought to be inferred. In the law of torts, malice has been defined to be "the doing any act injurious to another without just cause." In this sense of the word, an act may be malicious without justifying exemplary damages: *Hoffman v. Northern etc. R. R. Co.*, 45 Minn. 53; *Hamilton v. Morgan etc. Co.*, 42 La. Ann. 824; *Herreshoff v. Tripp*, 15 R. I. 92; *Clark v. Fairley*, 30 Mo. App. 335; *Jones v. Marshall*, 56 Iowa, 739; *Webb v. Gilman*, 80 Me. 177; *Haines v. Schultz*, 50 N. J. L. 481. But in the ordinary acceptation of the word, it implies an evil design to do an injury to another; and where malice in this sense accompanies or induces the commission of a tort, exemplary damages are recoverable for the injuries sustained therefrom: *Louisville etc. R'y Co. v. Wolfe*, 128 Ind. 347; 25 Am. St. Rep. 436; *Kemmitt v. Adamson*, 44 Minn. 121; *Gardner v. Minea*, 47 Minn. 295. The mere fact that the act is unlawful, and an injury to the plaintiff, does not entitle him to anything beyond compensatory damages, where it was not done with evil design, but on the contrary, was committed in good faith, and without intention to invade a legal right of another: *Anderson v. Sloane*, 72 Wis. 566; 7 Am. St. Rep. 585; *Weldell v. Hapner*, 124 Ind. 315; *Silver Creek Nav. Co. v. Mangum*, 64 Miss. 682; *Jackel v. Reiman*, 78 Tex. 588; *Erie Telegraph etc. Co. v. Kennedy*, 80 Tex. 71.

*Examples of Cases in Which Punitive Damages may be Recovered.* — In one state it has been said that exemplary damages are never recoverable for the malicious suing out of an attachment against the property of an alleged debtor: *Goodbar v. Lindsley*, 51 Ark. 380; 14 Am. St. Rep. 54. This is not a correct statement of the law upon the subject as it is understood elsewhere. The mere fact that the person who sued out an attachment fails in his action, and the final judgment therein establishes against him either that he had no sufficient cause for bringing the action or for taking out the writ, doubtless does not warrant the infliction of punitive damages upon him: *Ellis v. Bonner*, 80 Tex. 198; 26 Am. St. Rep. 731; *Trawick v. Martin-Brown Co.*, 79 Tex. 460; *Turner v. Hardin*, 80 Iowa, 691; *Townsend v. Fontenot*, 42 La. Ann. 890. Oppression and malice are manifested as often by the wrongful attachment of property as by any other means, and it would be strange if the law permitted no punishment of a wrong-doer in this respect. If the writ is sued out maliciously and without probable cause, or is used for the purpose of securing some improper object, or to oppress or harass the defendant, his recovery for the injuries suffered thereby is not limited to compensatory damages: *Jefferson Co. Sav. Bank v. Eorn*, 84 Ala. 529; *Farrar v. Talley*, 68 Tex. 349; *Biering v. First Nat. Bank*, 69 Tex. 599; *Heidenheimer v. Sides*, 67 Tex. 32; *O'Neil v. Wills Point Bank*, 67 Tex. 36; *Willis v. McNall*, 75 Tex. 69; *Morris v. Shew*, 29 Kan. 661. If an attachment or execution, though rightfully obtained, is levied upon property exempt therefrom, and this is done maliciously or oppressively, or with a knowledge of the exemption, and for the purpose of harassing the defendant, he may recover punitive damages: *Brown v. Bridges*, 70 Tex. 661. As hereinbefore stated, except in actions for breaches of contract to marry, exemplary damages are recoverable only in actions for torts: *Norfolk etc. R. R. Co. v. Wynn*, 82 Va. 250. A trespass upon real property made under a mistake as to the right of the trespasser, in good faith, and without any element of actual malice or any circumstance of rudeness, violence, or wantonness, entitles the party injured to compensatory damages only. Hence, though a corporation having power to exercise the

right of eminent domain enters upon land without first tendering compensation therefor, or taking proceedings to have the amount of such compensation ascertained, it is not liable to punitive damages, if its mode of action or the attending circumstances do not indicate any evil design or any intention to recklessly disregard the rights of the land-owner: *Keil v. Chartiers City Gas Co.*, 131 Pa. St. 466; 17 Am. St. Rep. 82; *Prueitt v. Cheltenham Quarry Co.*, 33 Mo. App. 18; *Gravett v. Mugge*, 89 Ill. 218; *Kilgannin v. Jenkinson*, 57 Mich. 325; *Wilkinson v. Searcy*, 76 Ala. 176. If, on the other hand, a trespass on real property is committed by one who knows that he is acting wrongfully, and in its commission there are circumstances of aggravation, as where it is accompanied by violence, insult, use of excessive force, reckless disregard of the rights of another, and the like, exemplary damages are allowable: *Craddock v. Goodwin*, 54 Tex. 578; *Craig v. Cook*, 28 Minn. 232; *International etc. R. R. Co. v. Telephone Co.*, 69 Tex. 277; 5 Am. St. Rep. 45; *Trauerman v. Leppincott*, 39 Mo. App. 478; *Koenigs v. Jung*, 73 Wis. 178; *Reynolds v. Braithwaite*, 131 Pa. St. 416; *Gross v. Hays*, 73 Tex. 515; *Robinson v. Going*, 63 Miss. 600. A forcible entry upon land, where it is punishable as a crime, will not sustain a claim for exemplary damages in those states in which the punishment of criminal torts is left wholly to the courts proceeding in the prosecutions of the crimes involved in their commission: *Moyer v. Gordon*, 113 Ind. 282. But where this rule does not prevail, there is no doubt that exemplary damages may be awarded in actions for forcible entry whenever the conduct of party in fault has been characterized by malice or oppression: *Shores v. Brooks*, 81 Ga. 468; 12 Am. St. Rep. 332; *Mosseller v. Deaver*, 106 N. C. 494; 19 Am. St. Rep. 540. Exemplary damages may also be recovered for an injury resulting from a nuisance, where the acts complained of have, by prior litigation between the parties, been adjudged to constitute a nuisance, or the fact that the nuisance existed is indisputable, and its abatement has been refused: *Ellis v. American Academy of Music*, 120 Pa. St. 608; 6 Am. St. Rep. 739; as where one continues to pollute the waters of a stream after judgment establishing that he has no right to do so: *Price v. Lawson*, 74 Md. 499; or persists in allowing a bawdy-house to be maintained upon his premises after notice to abandon it: *Besso v. Southworth*, 71 Tex. 765; 10 Am. St. Rep. 814.

In *Actions for Personal Injuries*, punitive damages may be granted or withheld upon the same principles as apply in other actions for torts. Thus if the plaintiff has been subjected to an assault and battery: *Irwia v. Yeager*, 74 Iowa, 174; *Kiff v. Youmans*, 86 N. Y. 324; 40 Am. Rep. 543; or a false imprisonment: *Ross v. Leggett*, 61 Mich. 445; 1 Am. St. Rep. 608; he is entitled to punitive damages, if the act from which he suffered was the result either of malice or reckless disregard of his rights. In many of the states, statutes have been enacted conferring upon wives causes of action against persons selling liquor to their husbands, in certain contingencies, and declaring that exemplary as well as compensatory damages may be awarded. Such damages are, however, recoverable only when the sale complained of was made in willful disregard of the rights of the wife, as where she had previously notified the seller not to furnish liquor to her husband, or such seller had otherwise been made aware of the wrong he was doing her: *Rouse v. Melzheimer*, 82 Mich. 172; *McMahon v. Sankey*, 133 Ill. 636; *Thill v. Pohlman*, 76 Iowa, 638; *Larzelere v. Kirchgessner*, 73 Mich. 276; *Reid v. Terwilliger*, 116 N. Y. 530; *Rosecrants v. Shoemaker*, 60 Mich. 4. In actions to recover for slander or libel: *Casey v. Huigan*, 118 Ind. 590; *Harman v. Cundiff*, 82 Va. 239; *Holmes v. Jones*, 121 N. Y. 461; *Fresh v. Cutter*, 73 Md. 87; 25 Am. St. Rep. 575; *Hess v. Sparks*, 44 Kan. 465; 21 Am. St. Rep. 300; *Newman v.*

*Stein*, 75 Mich. 402; 13 Am. St. Rep. 447; *Wood v. Hilbish*, 23 Mo. App. 389; *Montgomery v. Knox*, 23 Fla. 595; *Cotulla v. Kerr*, 74 Tex. 89; 15 Am. St. Rep. 319; *Grace v. McArthur*, 76 Wis. 641; *Bowden v. Bailes*, 101 N. C. 612; *Haines v. Schultz*, 50 N. J. L. 481; *Missouri etc. R'y Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794; or for malicious prosecution: See note to *Ross v. Hixon*, 26 Am. St. Rep. 163; *McGarry v. Missouri etc. R'y Co.*, 36 Mo. App. 340; or for enticing away a wife: *Johnson v. Allen*, 100 N. C. 131; or servant: *Duckett v. Pool*, 34 S. C. 311; or for willful refusal to perform an official duty: *Wilson v. Vaughan*, 23 Fed. Rep. 229; *Ellin v. Wilson*, 33 Md. 135; exemplary damages are always recoverable in proper cases.

*Carrier's Liability for.* — The mere refusal of a common carrier to discharge its obligations often constitutes a gross oppression of the person injured thereby, and furthermore, the denial of his rights frequently takes place under circumstances of peculiar aggravation, indicating, on the part of the servant or agent representing the carrier, a willful disregard of the rights of the person affected, and a desire to expose him to great personal mortification. In some of the states, as we have heretofore shown, a corporation is not answerable in exemplary damages for the malicious acts of its servants for which it is not blameworthy, but in others this is not the law, and the circumstances in which, in these latter states, a corporation acting as a common carrier may be held answerable in exemplary damages are worthy of more especial attention than they have hitherto received in this note. If a passenger is wrongfully ejected from a railway train, he is not entitled to exemplary damages on the ground that the servant of the carrier who ejected him acted with force and after deliberation. "On the contrary, to entitle one to such damages, there must be an element of fraud, or malice, or evil intent, or oppression entering into and forming part of the wrongful act. It is in such cases as these that exemplary or punitive damages are awarded as a punishment for the evil motive or intent with which the act is done, and as an example or warning to others. But where the act, although wrongful in itself, is committed in the honest assertion of a supposed right, or in the discharge of duty, or without any evil or bad intention, there is no ground on which such damages can be awarded": *Philadelphia etc. R. R. Co. v. Hoeflich*, 62 Md. 300; 50 Am. Rep. 223. Generally, when a conductor or other agent who ejects a passenger acts in good faith, in the belief that he is merely discharging his duty to his principal, and does not proceed in a reckless, wanton, or insulting manner, nor under the influence of malice or other improper motive, the damages recoverable are limited to compensation merely: *Patry v. Chicago etc. R'y Co.*, 77 Wis. 218; *Philadelphia Traction Co. v. Orbann*, 119 Pa. St. 37; *Holmes v. Carolina etc. R. R. Co.*, 94 N. C. 318; *Fitzgerald v. Chicago etc. R. R. Co.*, 50 Iowa, 79; *Tomlinson v. Wilmington etc. R. R. Co.*, 107 N. C. 327; *Gorman v. Southern Pac. Co.*, Cal., Dec. 1892.

In one case, in which it appeared that a conductor, in ejecting a passenger, acted kindly, it was held that exemplary damages might nevertheless be allowed, because of the sense of insult and mortification which he must have felt from being publicly removed from the train: *Georgia R. R. Co. v. Homer*, 73 Ga. 251. While compensation is properly allowed for the wounded pride which must necessarily result from the public and unlawful ejecting of a passenger from a railway car, yet it is certainly not true that punitive damages should also be given. "The better rule is, that where a passenger is wrongfully expelled from a railway train, he is entitled to recover the actual damages that he sustained therefrom, and if the expulsion is attended with undue force, or other aggravating circumstances calculated to humiliate the passen-



ger or wound his pride, or if the passenger be lawfully ejected, but undue force used, accompanied by fraud or the exhibition of malice, rudeness, recklessness, or other willful wrong, such exemplary damages may be allowed as the jury think are warranted by the facts": *Rose v. Wilmington etc. R. R. Co.*, 106 N. C. 168; *Georgia R. R. Co. v. Olds*, 77 Ga. 673; *Southern Kansas R. R. Co. v. Rice*, 38 Kan. 398; 5 Am. St. Rep. 766; *Louisville etc. R. R. Co. v. Maylin*, 66 Miss. 83; *Georgia R. R. & B. Co. v. E-kew*, 86 Ga. 641; 22 Am. St. Rep. 490; *Head v. Georgia P. R'y Co.*, 79 Ga. 358; 11 Am. St. Rep. 434; *Delaware etc. R. R. Co. v. Walsh*, 47 N. J. L. 548. Similar principles apply when redress is sought for other torts of a common carrier, such as carrying a passenger beyond the station of his destination: *Louisville etc. R. R. Co. v. Ballard*, 88 Ky. 159; *Dorrah v. Illinois etc. R. R. Co.*, 85 Miss. 14; 7 Am. St. Rep. 629; *Samuels v. Richmond etc. R'y Co.*, 35 S. C. 493; *post*, p. 883; *Mississippi etc. R. R. Co. v. Gill*, 66 Miss. 39; refusing to receive, carry, or deliver goods: *Avinger v. South Carolina R. R. Co.*, 29 S. C. 265; 13 Am. St. Rep. 716; *Silver v. Kent*, 60 Miss. 124; or to sell an intending passenger a ticket: *Pittsburgh etc. R. R. Co. v. Lyon*, 123 Pa. St. 140; 10 Am. St. Rep. 517; or to stop at a station to give him an opportunity to take his train: *Purcell v. Richmond etc. R. R. Co.*, 108 N. C. 414; *Wilson v. New Orleans etc. R. R. Co.*, 63 Miss. 352; in all of which exemplary damages may be given or withheld, according to the accompanying circumstances, punishment being properly inflicted only when the agent has acted recklessly or from bad motives, or has performed his supposed duties in an insulting, harsh, or oppressive manner.

*Criminal Torts.* — When a tort for which damages are sought also constitutes a crime for which the offender may be tried, and if convicted, punished, the courts of some of the states insist that the punishment of the wrong-doer must be left entirely to the criminal courts and laws, and therefore that in a civil action none but compensatory damages may be recovered of him, no matter how wanton, oppressive, or insulting his conduct may have been: *Howlett v. Tuttle*, 15 Col. 454; *Wabash Printing etc. Co. v. Crumrine*, 123 Ind. 89; *Murphy v. Hobbs*, 7 Col. 541; 49 Am. Rep. 366; *Fay v. Parker*, 53 N. H. 342; 16 Am. Rep. 270; *Austin v. Wilson*, 4 Cush. 273; 50 Am. Dec. 766. Other courts, while determining that punitive damages are recoverable for criminal torts, permit the fact that the defendant has been prosecuted and punished to be given in evidence in mitigation of exemplary damages: *Smithwick v. Ward*, 7 Jones, 64; 75 Am. Dec. 453; *Sowers v. Sowers*, 87 N. C. 303; *Flanagan v. Womack*, 54 Tex. 45; *Shook v. Peters*, 59 Tex. 393. The better opinion, however, is, that the fact that the defendant either may be or has been punished in a criminal proceeding does not deprive the party injured by a criminal tort of his right to exemplary damages: *Smith v. Bagwell*, 19 Fla. 117; 45 Am. Rep. 12; *Johnson v. Smith*, 64 Me. 553; *Elliott v. Van Buren*, 33 Mich. 49; 20 Am. Rep. 668; *Roberts v. Mason*, 10 Ohio St. 277; *Barr v. Moore*, 37 Pa. St. 385; 30 Am. Rep. 367; *Edwards v. Leavitt*, 46 Vt. 126; *Brown v. Swineford*, 44 Wis. 282; 28 Am. Rep. 582; *Boetcher v. Staples*, 27 Minn. 308; 38 Am. Rep. 295; *Bundy v. Maginess*, 76 Cal. 532. If, indeed, the true ground for allowing exemplary damages is to inflict punishment upon the defendant, and thereby to deter him from committing future wrongs, it would seem that when he has already been punished as the result of a criminal prosecution, this fact ought, at least, to be a proper one to be considered by the jury before awarding any further punishment against him. The weight of authority is, nevertheless, inclined against this view, and in favor of the proposition that nothing which has occurred or can occur in a criminal prosecution to which the plaintiff is not a party can be used against him even for the pur-

pose of diminishing the amount of his recovery: *Phillips v. Kelly*, 29 Ala. 628; *Corwin v. Walton*, 18 Mo. 71; 50 Am. Dec. 285; *Cook v. Ellis*, 6 Hill, 466; 41 Am. Dec. 757; *Reddin v. Gates*, 52 Iowa, 210.

*Actual Damages must Exist.* — To entitle plaintiff to exemplary damages, he must have suffered actual damages, and therefore, whenever it appears from the evidence or the finding of the jury that his injuries were nominal, entitling him to but nominal damages, then the jury should not find a verdict inflicting punitive damages, and any instruction permitting them to do so is erroneous: *Stacy v. Portland P. Co.*, 68 Me. 279; *Kuhn v. Chicago etc. R'y Co.*, 74 Iowa, 137; *Schippel v. Norton*, 38 Kan. 567.

*Office of Court and Jury respecting.* — The court must determine whether there is any evidence before it upon which an award of exemplary damages can be sustained, and must not submit the question of such damages to the jury in the absence of such evidence. When the evidence is such that the jurors may, if they see fit, award such damages, the question whether it shall be awarded must rest wholly with them, and the court ought not to undertake to influence their verdict in this respect by indicating that it is their duty to award such damages, or that plaintiff is entitled to them as a matter of law: *Sedgwick on Damages*, 3d ed., sec. 387. While it is often said that "the amount of exemplary damages is within the discretion of the jury," yet it is clear that this discretion does not involve in it the right to exercise mere caprice or to gratify feelings of resentment or passion, and therefore that a verdict, though exemplary damages may properly be an element of it, may and ought to be set aside by the court "when it is grossly excessive, or evidently actuated by passion or prejudice, or undue influence": *Sedgwick on Damages*, 3d ed., sec. 388; *Borland v. Barrett*, 76 Va. 128; 44 Am. Rep. 152; *Berkett v. Lanata*, 15 La. Ann. 337; *contra*, *New Orleans etc. R'y Co. v. Hurst*, 36 Miss. 660; 74 Am. Dec. 785.

## SAMUELS v. RICHMOND AND DANVILLE RAILROAD COMPANY.

[35 SOUTH CAROLINA, 493.]

### DAMAGES — EXEMPLARY, WHEN MAY BE RECOVERED, AND HOW PLEADED. —

A tort that sounds in exemplary damages exists when some right or property of a person, natural or artificial, is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obligations. To entitle a plaintiff to recover such damages, he must allege and prove the distinctive elements of such a tort.

**DAMAGES — EXEMPLARY — RECKLESS FAILURE TO DELIVER PASSENGER AT HIS DESTINATION.** — Where a railroad corporation fails to land a passenger at his exact destination, according to its contract, it is liable in damages therefor, unless it can show some controlling exigency preventing it from fulfilling its engagement; and if it, by its conductor, unlawfully expels the passenger at some other point, in an oppressive, malicious, reckless, insulting, or unnecessarily rude and violent manner, it is liable in exemplary damages.

**DAMAGES. — EXEMPLARY DAMAGES ARE AWARDED** as compensation to the plaintiff for the wrong done him, and at the same time as a punishment for the tort-feasor.

**DAMAGES — EXEMPLARY — INSTRUCTIONS. —** In an action for exemplary damages, it is the privilege and duty of the trial court to determine, in the first instance, whether or not there is any evidence in support of the allegations in issue; but it cannot go further, and decide and announce to the jury, in its instructions, that the evidence offered establishes, or does not establish, the issue. This is a question solely for the jury to decide.

**DAMAGES — EXEMPLARY — INSTRUCTIONS. —** In an action to recover exemplary damages, properly pleaded and sustained by some proof, requests for instructions not broad enough to cover the whole law relating to such damages are properly refused.

**DAMAGES — EXEMPLARY — INSTRUCTIONS — NONSUIT. —** In an action to recover exemplary damages, sufficiently pleaded and sustained by some proof, the jury may properly be instructed to find whether or not the plaintiff is entitled to recover in the absence of a motion for a nonsuit.

*J. S. Cothran and B. L. Abney*, for the appellant.

*Henderson Brothers and J. R. Cloy*, for the respondent.

**POPE, J.** In the court of common pleas for Aiken County, on the twentieth day of February, 1891, before his honor Judge Izlar and a jury the action for one thousand dollars damages, between the plaintiff and defendant, came on for trial. The complaint, amongst other things, alleged,—“3. That on the 24th of December, 1890, the plaintiff, Elizabeth Samuels, a widow, with her three little children, boarded the south-bound passenger train of the defendant lessee company at Vacluse, a station on said road, for the purpose of taking passage to Aiken Junction, another station on said road; that she purchased from the agent at Vacluse a ticket for said Aiken Junction, having paid him the fare usually demanded and paid therefor, which said ticket was taken up by the conductor in charge of the train, and yet said train ran negligently and carelessly carried her beyond said Aiken Junction for a considerable distance, and plaintiff and her children were carelessly, negligently, and in a rude, angry, and insulting way, ejected from the said train at a place unusual and remote, wet and damp, and she and they were compelled to walk back to said Aiken Junction, and from there to the place they were going, encumbered with bundles and baggage, without the escort who were to meet her at the station; by all of which acts and grievances said plaintiff was injured in her person and feelings to her great damage, one thousand dollars.” The answer of the defendant denied the allegations in said paragraph 3 of the complaint.

The testimony established the following as the facts of the case: On the 24th of December, 1890, a ticket was purchased of the defendant's agent at Vacluse and received by the plaintiff, by which she was entitled to passage on defendant's train to Aiken Junction, on defendant's leased road. The conductor, after plaintiff delivered to him her ticket, was requested by her to be let off the train at Aiken Junction. The plaintiff was accompanied by her three little children, and carried a large basket. Her brother-in-law was expected to meet her at Aiken Junction, and was there to meet her and accompany her to his house. The train was about a half-hour behind the schedule time, and was not stopped at Aiken Junction, although it was the duty of the defendant to stop there to let off and take on passengers at that point. The conductor, being apprised of his failure to let plaintiff and her children get off at Aiken Junction, did stop the train from 275 to 400 yards beyond that station. The point at which plaintiff and her children were landed was damp and in a ditch. Plaintiff requested conductor to take her back to the station, which he declined to do. No reason was given for such refusal. Plaintiff suffered for more than a week from prostration because of these facts.

Both plaintiff and defendant made written requests of the trial judge for charges. No complaint is made of the charge upon some of such requests, and as any alleged errors therein are embodied in defendant's grounds of appeal, we will consider them there. The jury rendered a verdict for plaintiff of one hundred dollars. After judgment thereon, the defendant appealed therefrom.

We will now consider the grounds of appeal. The first and second grounds will be considered together, and are as follows: "1. Because the presiding judge erred in charging the jury, 'that if the conductor, upon demand that he should return the passenger to the station to which she had purchased her ticket, willfully and without just excuse refused to do so, and ejected her from the train, she would be entitled to recover exemplary damages,'—the error consisting of not charging the jury that such action must amount to malicious, insulting, or oppressive conduct on the part of the conductor; 2. Because the presiding judge erred in charging the jury, 'that if a party is carried beyond the station to which she has purchased her ticket, and demands that she be returned to the station, and the conductor willfully refuses, in a sense that I have endeav-

ored to show you, — that a mere refusal would not do, but it must be willful and without excuse, — should refuse to return her, why, she would be entitled to such damages, not only for what was the contract and may be the result of the act, but such additional damages as you, in your judgment, may think proper to give her by way of exemplary damages.’”

The propriety of this court considering these grounds of exception together will be manifest by reading both at the same time. If taken singly, each one would fall within that class which makes a quotation here and a quotation there of a judge's charge, by which a great injustice is done the trial judge. He is entitled to have his whole deliverance upon any branch of the law considered. Counsel have shown their careful preparation in this case by having made written requests to charge. The great advantage from such a course is, that they are thereby enabled to have the trial judge meet their issues squarely, and if in error, point this court to the same. They did not go far enough in this case. The consequence is, that they assail the charge of the trial judge by snatches. This court has frequently expressed its disapproval of such a course. Apart from the authority of such ruling here, its wisdom is apparent, and should commend it to the ready acceptance and observance by the bar. Inasmuch, however, as these grounds of appeal, when considered together, reasonably well represent the charge of the trial judge on the point made, we will consider it.

It must be borne in mind, whenever a tort sounds in exemplary damages, that it belongs to a particular class of actions; it is one species of that class. A tort that sounds in exemplary damages is where some right of person or property is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obligations. The terms “maliciously” and “wantonly” are used in this definition in the sense that they are applied by writers in connection with the subject here considered. To entitle a plaintiff to exemplary damages, he must not only prove the elements that enter in to make up this cause of action, but he must, in the first place, in his complaint, set up distinctively the elements that make up his cause of action, and if he fails to do so, his complaint should be dismissed. Any other course is subversive of the rules of pleading; it may be to complain of one wrong, and then prove another. Every defendant is entitled to know, by the pleadings, what he is expected to answer; having answered, he is

entitled to have the testimony restricted to the cause of action set up in the complaint. Fortunately for the plaintiff here, the complaint sets up a tort sounding in exemplary damages. Let us now consider these exceptions.

What is the duty of a common carrier to a passenger, so far as carriage to the point of destination is concerned? Suppose, by way of illustration, a stage-coach had as its passenger one who had paid his fare and obtained passage to a particular point on the route traversed by such stage-coach. What would be the right of the passenger there? Unquestionably, it would be to be carried to the exact point contracted for; but suppose the carrier recklessly, or willfully, or wantonly, or maliciously, or negligently carried the passenger past the place of his destination, would there not arise a palpable invasion of such passenger's right? It is true, such a wrong would, so to speak, arise out of the contract of carriage, yet it was not an actual stipulation in the contract by express words, for it is seldom, if ever, that the parties to such a contract enter into such stipulations. The contract, therefore, would not be complained upon, nor would it be the cause of action. No, rather it would be the willful, or malicious, or wanton, or neglectful, or utter disregard shown by the carrier to the rights of the passenger. The duty owed by the carrier was not paid, and would not be answered except by the delivery of the passenger at the point of destination, if in his reasonable power. But suppose the horses took fright and became unmanageable and ran while near the point of destination, and the carrier, after the fright, used his utmost endeavors to stop them and could not do so, he would not be culpable. Or suppose a fire was raging at the point, so that it could not with safety be reached, or suppose, in approaching the destination, it was learned that some violent disease was raging that endangered the lives of any that approached the point of passenger's destination, such failure would not be visited upon the carrier.

Now, the foregoing illustrations, as applied to a stage-coach, are such as might attend passage by that mode of travel. In the case of railroad trains, when a passenger had provided himself with the right to demand a delivery of himself as a passenger thereon at some point on the railway's route of travel, if such carrier was surrounded by circumstances that would excuse his failure to deliver his passenger at its depot or station, such as a fire raging at that point, or in case of delay, the danger of a collision with another train if a stop was

made, such railroad would be excused for such failure. But suppose it arose from the careless indifference of the conductor or a malicious disregard of the passenger's right, would it be excusable? Certainly not. If the carrier can with safety discharge his passenger at the point of destination, such passenger has the right to such action; and if from any cause and in a reasonable distance from such station that has been passed without the passenger having been afforded an opportunity to alight at his destination, such omission is discovered, it is the duty of the carrier to return such passenger to that destination. It will not be excused because it is inconvenient or troublesome; it will only be excused upon the proof of some controlling exigency, and the burden of such proof is upon the carrier the moment the passenger proves that he had the right of passage to a certain point and a compliance on his part with ordinary care, and that such point of destination was passed by the carrier without giving the passenger an opportunity of getting off then. Such being our view of the law, and after applying it to the charge of the trial judge, we do not find that he has committed any error, and therefore these two grounds of appeal are dismissed.

The appellant urges as his third ground of appeal: "3. Because the presiding judge erred in charging the jury plaintiff's second request to charge, which was as follows: 'The rule in regard to damages is, that they should be such only as would compensate the plaintiff for such injuries as she had suffered; and if there was an expulsion, and same was unlawful, and the conductor's conduct was oppressive, malicious, reckless, and disregarding of the plaintiff's feelings, or insulting or unnecessarily rude and violent, the jury may go beyond the actual amount of damage done the plaintiff, and give such amount as they think she ought to have, not only to compensate her, but to punish the defendant for such conduct, but the amount should not be excessive.'"

In our consideration of the first two grounds of appeal, we have laid down a definition of exemplary damages. We did not state the authorities for such declaration. Briefly, it may be stated as the result of judicial interpretation of this class of torts, that the damages awarded against the defendant are intended to compensate the plaintiff for the wrong done him, and at the same time as a punishment for the tortfeasor. This view prevails in this and the mother country. It applies to natural persons and to artificial persons. It not

only reaches to the master, but also to his servants. Such damages apply to any malicious, violent, oppressive, wanton, or inconsiderate or reckless disregard of the social or civil obligations shown by one person with the rights of another. One of the latest expressions of our own court of last resort in this state on this subject may be found in the judgment of this court delivered by Chief Justice McIver in the case of *Duckett v. Pool*, 34 S. C. 324, where he said: "In an action of tort, where the testimony satisfies the jury that the defendant has acted maliciously, willfully, or in wanton disregard of the rights of plaintiff, the jury may, in addition to such damages as will compensate plaintiff for any loss or injury he may have sustained in person, property, or feelings, award other damages, called, indifferently, 'exemplary,' 'vindictive,' or 'punitive,' by way of punishment to the defendant." In this case the chief justice has collated a large number of our own decisions on this subject,—amongst others, *Palmer v. Charlotte etc. R. R. Co.*, 3 S. C. 597; 16 Am. Rep. 750; *Hall v. South Carolina R'y Co.*, 28 S. C. 263; *Quinn v. South Carolina R'y Co.*, 29 S. C. 386. Care should be taken to observe the meaning attached to the terms "malicious," "wanton," in connection with this offense, for both the text-writers and judges, in their decisions, attach a significance to them over and beyond their primal meaning. In the light of these observations, we fail to detect error in this part of the judge's charge. This ground of appeal must be dismissed.

The fourth ground of appeal is presented in these words: "4. Because the presiding judge refused to charge the defendant's second request, which was as follows: 'We request your honor to charge the jury, that while they are the sole judges of the effect of the proof, it is the province of the court to say whether there is or is not proof going to establish every issuable fact in this case, and that in this case there is no proof to show willfulness or oppressiveness or cruelty on the part of the conductor, without which the jury can only find a verdict for actual damages sustained by the plaintiff, and that in the absence of such proof a verdict for punitive or exemplary damages cannot be sustained.'" By reference to the "case," we find the trial judge used this language: "I cannot so charge you,—not in the language of that request."

It will be conceded that a party making a request has to be careful not to mingle the doubtful or bad with the certain and good; for if the judge cannot charge it as a whole, and the re-



quest is faulty, it is not error to refuse the request. We think the safer practice is for the trial judge to indicate what parts are objectionable and which he declines to charge, and give the party seeking the request the benefit of his charge upon what is good. Of course, this is upon the supposition that the request is so divisible. But we would not be understood as laying down any rule on the subject. It may be better to let attorneys, in their laudable efforts to attain the very best results of which their cases are capable, have this as an additional stimulus to an excellence that will surmount all obstacles. However, we will not take advantage of this seeming difficulty, for unquestionably the request was not broad enough to embody correctly the definition of the torts redressible by exemplary damages.

But there is a question presented by this exception that merits attention: we mean that part that seeks to fasten upon the trial judge the duty of passing upon the question whether there is or is not proof going to prove every issuable fact in this case. What the appellant seeks here is a ruling from the trial judge as to his duty in the first instance, before submitting the case to the jury, but to be submitted by him in his instructions to the jury, to decide whether, under the testimony in this case, there is made a case justifying exemplary damages. It is due to appellant here, that we should acknowledge that there are some expressions in that portion of the work of Mr. Thompson on negligence devoted to a consideration of punitive damages, notably at page 1264, which seem to indicate that the trial judge should decide this question, and so state his conclusion to the jury. This is the language of that author: "Exemplary, punitive, vindictive, damages, or smart-money, as they are called indifferently, are given by way of punishment of the wrong committed by the defendant, and with a view of deterring others from like offenses. Whether or not the case is one that justifies exemplary damages, is a question for the court to determine in its instructions to the jury. In the discharge of this duty, the court looks to the *animus* of the defendant that accompanied the injury. If it was wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of willfulness or wantonness, the court will instruct the jury that they are at liberty to find for the plaintiff, in addition to a compensation for the injury actually sustained, such a sum as the circumstances justify."

While this court has already approved this declaration by the author, wherein he defines this class of torts, yet we have been unable to discover anything in this class of offenses that justifies any greater power in a trial judge in regard thereto than such as are legitimately exercised by him in any other cases. This court has repeatedly recognized it as the privilege and duty of a trial judge to determine, in the first instance, whether there is any evidence in a case going to establish the issuable facts, and if the learned author merely intends to state this conclusion, we heartily concur with him. But if it is intended to go further, and say that a trial judge must decide and announce to the jury that the testimony offered has established certain conclusions, thereby invading the province of the jury, we cannot concur; for such a view is not only at variance with repeated declarations of this court limiting the power of trial judges in deciding questions of fact in his charge to the jury, but also with the letter and spirit of the provisions of our state constitution relating to trial by jury. We are very glad of an opportunity, occurring as it does so soon after the decision of this court in the case of *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475, *ante*, p. 858, where this very quotation from Thompson on Negligence is made, to record this expression of our views touching the same, for, we may remark, in the hurry incident to the preparation of the opinion of the court in that last-mentioned case, we failed to state our restricted approval of the same. This ground of appeal must be dismissed.

Appellant's fifth ground of appeal is: "Because the presiding judge erred in refusing to charge the jury the defendant's fourth request, which was as follows: 'If the testimony satisfies you that the defendant was at fault, the compensation to the plaintiff must be limited to the inconvenience, loss of time, and labor of traveling back from the point where she left the train.'" By this request to charge, it seems to us that the defendant sought to restrict the consideration of the jury to only a portion of law relating to exemplary damages. We think the trial judge very wisely so considered the request. Having stated already in this opinion at length the law intended to apply to this class of torts, we will not repeat it here, except to state that this request was not broad enough. This ground of appeal must be dismissed.

Lastly, the sixth ground of appeal will be considered; it reads: "Because the presiding judge erred in permitting the

question whether the plaintiff was entitled to exemplary damages to go to the jury, because there were no facts in the case to characterize the conduct of the conductor as malicious, oppressive, or reckless of the rights of the plaintiff, and submission of such a question to the jury tended to mislead them as to their duty in the case." As we before remarked, this was an action upon a tort sounding in exemplary damages, and not one for actual damages. The testimony offered was responsive to the allegations of the complaint. If there was a failure of plaintiff's testimony, a nonsuit was in order. This the trial judge could grant of his own motion, or upon a motion therefor by defendant. Certainly, the defendant did not so move. The trial judge evidently thought there was some testimony on the issues raised by the pleadings. Such being the case, he ought not to have granted a nonsuit. Without a nonsuit, it was imperative that the case should be submitted to the jury. Unfortunately for the defendant, they took a different view of the virtue of the testimony from that entertained by it. Their verdict was not large. This court seldom interferes with verdicts like this. This ground of appeal must be dismissed.

It is the judgment of this court that the judgment of the circuit court be affirmed. —

**EXEMPLARY DAMAGES**, when recoverable and how pleaded, is discussed in *Spellman v. Richmond etc. R. R. Co.*, 35 S. C. 475; *ante*, p. 858, and note.

**DAMAGES — EXEMPLARY, FOR FAILURE TO DELIVER PASSENGER AT PROPER DESTINATION.** — Exemplary damages will not be allowed for failure to stop a train at a station, and give a passenger opportunity to alight, unless the failure to stop was willful, or the wrong was aggravated in some way by the conduct of the railroad employees: *Dorrah v. Illinois Cent. R. R. Co.*, 65 Miss. 14; 7 Am. St. Rep. 629, and note.

CASES  
IN THE  
COURT OF APPEALS  
OF  
TEXAS.

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LYLE v. STATE.

[30 TEXAS APPEALS, 118.]

**GAMING-TABLE, WHAT IS — HOW DETERMINED.** — It is not the structure of a table that determines whether or not it is a gaming-table, but the character of the game that is played upon it. A table, to come within the statutory meaning of a gaming-table, must be kept or exhibited for the purpose of obtaining betters. A table with a hole in the center, through which players playing the game of draw-poker drop a chip for the owner of the table, when they hold threes, flushes, or full hands, is not a gaming-table within the meaning of the statute.

*Thurmond and Yantis*, for the appellant.

*R. H. Harrison*, assistant attorney-general, for the state.

**HURT, J.** Appellant was convicted for keeping and exhibiting a gaming-table.

The facts show that a game of draw-poker was played on the table, and that appellant was proprietor of the room in which the game was played. He was also the owner and proprietor of the table. The table was covered with cloth, and in the center was a small hole, where the players, when they held threes, flushes, or full hands, would put one chip for appellant, the proprietor.

Was such a table upon which poker was played a gaming-table within the meaning of the statute?

In *Chappell v. State*, 27 Tex. App. 310, it is said that it seems that the structure of the table — that is, whether it was made specifically for gaming purposes — cannot ordinarily affect the question. It is rather from the character of the playing or game which is played that it receives its specific

designation. Applying this plain rule, it follows, that, from the character of the game played, — poker, — the table thus used was simply a poker-table, — that is, a table upon which poker was played.

The table, to come within the meaning of the statute, must be such as can be bet at by some one beside the keeper or exhibitor; for it must be kept or exhibited for the purpose of obtaining betters: Pen. Code, art. 363.

Now, we think that an illustration will demonstrate that the table under discussion was not a gaming-table within the meaning of article 358 of the Penal Code. Suppose the parties who bet at poker were indicted and convicted for betting at a gaming-table under article 364, — would the proof in this case sustain the conviction? Certainly not, because they played and bet at poker. We think this shows that the table was not a gaming-table within the meaning of article 358.

The rehearing is granted, and the judgment is reversed and cause remanded.

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**GAMING-TABLE — WHAT IS.** — The keeper of a table, where parties, with his knowledge, play billiards with the understanding that the loser pays for the use of the table, is guilty of running a gambling game: *State v. Book*, 41 Iowa, 550; 20 Am. Rep. 609. A billiard-table used for playing faro ceases to be a billiard-table in the eyes of the law, and does not fall within the exception of the statute prohibiting the keeping of any gaming-table except a billiard-table: *State v. Price*, 12 Gill & J. 260; 37 Am. Dec. 81. The proprietor of a saloon who gives out cards and sells chips to persons who frequent his place for the purpose of playing cards on one of the tables in his bar-room, but who takes no part in the game himself, is guilty of running a gaming establishment: *State v. Gilmore*, 98 Mo. 206. The defendants were on trial for exhibiting a gaming-table, and asked the trial judge to instruct the jury, that if they found from the evidence that the defendants owned a pool-table where pool was played for table fees, but that they did not keep nor exhibit the table for gaming purposes, they should acquit the defendants. It was held error to refuse such a charge announcing a correct principle of law and responding to the proof in the case: *Smith v. State*, 28 Tex. App. 102.

## MARTINEZ v. STATE.

[30 TEXAS APPEALS, 129.]

**MURDER — EXPRESS MALICE DEFINED.** — In a charge to the jury on a trial for murder, the following is a correct and sufficient definition of express malice: "Express malice is where one, with a sedate and deliberate mind and formed design, unlawfully kills another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, concerted schemes to do him some bodily harm, or any other circumstances showing such sedate and deliberate mind and formed design unlawfully to kill another, or to inflict serious bodily harm which might probably end in the death of the person upon whom the same was inflicted."

**IMPLIED MALICE, DEFINITION OF, SUFFICIENT IN CHARGE TO JURY.** — In a charge to the jury on a trial for murder, the following is a correct and sufficient definition of implied malice: "Implied malice is that which the law infers from or imputes to certain acts. Thus when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice."

**MALICE, DEFINITIONS OF, SUFFICIENT IN CHARGE TO JURY.** — In a charge to the jury on a trial for murder, the following definition of malice is correct: "Malice is a condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken." And so, also, is the following: "Malice, in its legal sense, means the intentional doing of a wrongful act toward another, without legal justification or excuse."

*John A. Green, Jr., and West and McGown, for the appellant.*

*R. H. Harrison, assistant attorney-general, for the state.*

DAVIDSON, J. At a former day of this term, the judgment in this cause was affirmed without a written opinion. There is a bill of exceptions in the record reserved to the charge, because "it did not properly define express malice aforethought or implied malice aforethought."

Since the affirmance, appellant files a motion for rehearing, as follows, to wit: "The court erred in not sustaining defendant's bill of exception No. 1, which bill complained of the error of the trial court in not charging upon and fully explaining to the jury malice aforethought"; and in support of appellant's contention, that the court ought to have explained to the jury malice aforethought, he submits the attached authorities: *Washington v. State* (not reported); *Ainsworth v. State*, 29 Tex. App. 599; both decided at the present term of this court. The two cases cited were decided on the same day on which appellant's case was affirmed, and both of said cited cases were reversed, among other reasons, because the trial

court, in his charge, failed to define malice. The question decided in said two cases is not a novel proposition in this state, and was not, prior to the two cases cited: *Crook v. State*, 27 Tex. App. 198; *Childers v. State*, Tex. App., March 5, 1890; 13 S. W. Rep. 650; Willson's Crim. Stats., sec. 1061; *Richardson v. State*, 28 Tex. App. 216.

By reference to the bill of exception mentioned in the motion for rehearing, it will be seen that it was reserved to the supposed error on the part of the trial court in failing to define express and implied malice. The charge thus defines express malice: "Express malice is where one, with a sedate and deliberate mind and formed design, unlawfully kills another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm, or any other circumstances showing such sedate and deliberate mind and formed design unlawfully to kill another, or to inflict serious bodily harm which might probably end in the death of the person upon whom the same was inflicted. Implied malice is that which the law infers from or imputes to certain acts. Thus when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice."

These charges are precisely in the language contained in Willson's Criminal Forms, Nos. 710, 711, and which have been recognized as the correct rule for charging upon and defining the two phases of malice: *Jordan v. State*, 10 Tex. 479; *McCoy v. State*, 25 Tex. 33; 78 Am. Dec. 520; *Farrer v. State*, 42 Tex. 271; *Plasters v. State*, 1 Tex. App. 673; *Cox v. State*, 5 Tex. App. 493; *Sharpe v. State*, 17 Tex. App. 486; *Harris v. State*, 8 Tex. App. 90; *Douglass v. State*, 8 Tex. App. 520; *Neyland v. State*, 13 Tex. App. 536; *Reynolds v. State*, 14 Tex. App. 427; *Turner v. State*, 16 Tex. App. 378; *Hubby v. State*, 8 Tex. App. 597; and numerous other authorities.

While the bill of exceptions is not reserved to any supposed defect of the charge in failing to define the term "malice" or "malice aforethought," yet the question sought to be raised will be treated as if it was so reserved. By an examination of the charge, we find this language contained therein: "Malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is

inferred from acts committed or words spoken." This form of definition is now and has been recognized as a correct one by the courts of last resort, as announcing a true rule by which to measure malice under our statute of murder. Another rule laid down as equally correct is thus defined: "Malice, in its legal sense, means the intentional doing of a wrongful act towards another, without legal justification or excuse." Sometimes one of these forms is employed in the charge and sometimes the other, and some of our judges use both. It is wholly immaterial which is used, as they convey substantially the same idea. Judge Clark, in a carefully considered opinion, in speaking of a proper definition of the term "malice," said that "a perfectly exact and satisfactory definition of that term, signifying its legal acceptation in a form at once clear and concise, has been often attempted, but with no very satisfactory permanent results. The differing minds of different courts have employed different terms and language in an attempt to convey substantially the same meaning; and while a general similarity is apparent in all the definitions, the legal mind has not yet crystallized the substance of the term into a terse sentence readily comprehensible by the average juror. About as clear, comprehensive, and correct definition as the authorities afford is, that 'malice is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken': *Harris v. State*, 3 Tex. App. 109, 110; *McKinney v. State*, 8 Tex. App. 643; *Gallaher v. State*, 28 Tex. App. 266, and authorities cited; *Bramlette v. State*, 21 Tex. App. 619; 57 Am. Rep. 622; *Pickens v. State*, 13 Tex. Ct. App. 357, and cited authorities; *Hayes v. State*, 14 Tex. Ct. App. 331, 332; 3 Crim. Law Mag. 216; Willson's Crim. Forms, 708. The authorities sustain the definition of malice embraced in the court's charge as given in this case. Other language might be used to convey the same idea, and other words could be employed that would give as satisfactory definition of the term "malice" as is employed in the two forms quoted above. We do not intend to say that such a result could not be reached. We simply say that the forms given by Judge Willson are sufficient, and are abundantly supported by the authorities. We cannot agree with appellant that malice or malice aforethought is not defined in the charge, because the record shows directly to the contrary from the above-quoted charge defining malice. We find that term fully defined.



Not only so, but the terms "express malice" and "implied malice" are also fully and legally defined in said charge.

The two recent authorities cited by appellant are not applicable to this case. Malice is defined in the charge in this case, whereas in those cases it was not defined, nor was a definition thereof sought to be given by the court.

The grounds of the motion for rehearing are not sustained by the record, but pointedly contradicted thereby.

The record shows a cruel and heartless killing of a man and his wife in the dark hours of the night. They were evidently attacked while sleeping in their bed in their own house, and by defendant, whom they trusted as their friend, and whom they afforded the friendly protection of their home and roof. When they were aroused by the murderous assault of defendant, they fled from their house, into the protection of the night, outside. Here they were pursued by his fiendish malice, and chased down and stabbed to death in an atrocious manner in their own yard. The verdict, in assessing his punishment at confinement in the penitentiary for a term of years, was lenient and merciful, and he has reason to congratulate himself therefor.

We see no reason why we should recede from our former opinion, and the motion for rehearing is therefore overruled.

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**HOMICIDE—EXPRESS MALICE DEFINED.** — Blackstone's definition of express malice is adopted by this court as correct, and is as follows: "Express malice is where one, with sedate and deliberate mind and formed design, doth kill another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm": *McCoy v. State*, 25 Tex. App. 33; 78 Am. Dec. 520, and note, in which a large number of cases are collected: *Gonzales v. State*, 28 Tex. App. 130; *McWhirt's Case*, 3 Gratt. 594; 46 Am. Dec. 196. See *Carson v. State*, 80 Ga. 170, for facts constituting express malice.

**HOMICIDE—IMPLIED MALICE—WHAT IS.** — If the act which produced death is attended with such circumstances as indicate a wicked, depraved, and malignant spirit, the law will imply malice, without reference to what was in the defendant's mind at the time: *State v. Levelle*, 34 S. C. 120; 27 Am. St. Rep. 799. Malice is always inferred where one deliberately injures another: *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 520. If a man uses a deadly weapon on another in such a manner as to have a direct tendency to destroy human life, it is a necessary conclusion that the person thus using the weapon intends to take life or do great bodily harm: *Vann v. State*, 83 Ga. 44. Implied malice is that which the law infers from certain acts: *Boyd v. State*, 28 Tex. App. 137; *Jacobs v. State*, 28 Tex. App. 79.

**HOMICIDE—MALICE—WHAT IS.** — Malice, in the definition of murder, is imputed to an act done willfully, *malò animo*, wrong in itself, injurious to

another, and for which there is no apparent justification: *Commonwealth v. York*, 9 Met. 93; 43 Am. Dec. 373, and note; note to *State v. Alexander*, 14 Am. St. Rep. 882; *Gallaher v. State*, 28 Tex. App. 247; *Powell v. State*, 28 Tex. App. 393. Malice is the deliberate intention unlawfully to take away the life of a fellow-creature: *Carson v. State*, 80 Ga. 170. See also *State v. Thomas*, 99 Mo. 235.

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## CHILDERS v. STATE.

[80 TEXAS APPEALS, 160.]

**HOMICIDE — SELF-DEFENSE — CHARACTER OF DECEASED, ADMISSIBILITY OF EVIDENCE OF.** — Where a prisoner on trial for murder claims that the homicide was committed by him while defending his person against an unlawful assault by the deceased, evidence that before the homicide was committed the deceased was pointed out by the witnesses to the defendant, who was a stranger in the community, as a man who, from his own account of himself, was a man of dangerous and desperate character, is admissible to show that the defendant, in repelling the assault, acted under a reasonable apprehension of death or serious bodily harm. Such evidence is admissible for the purpose of enabling the jury to judge the conduct of the accused from his stand-point, and in the light of all the surrounding facts and circumstances attending the homicide, and as the same appeared to him.

**HABEAS CORPUS, TESTIMONY TAKEN ON, NOT ADMISSIBLE ON TRIAL OF ACCUSED.** — Testimony taken before a court on the hearing of a writ of *habeas corpus*, even though written down and signed by the witness, is not admissible in evidence against the accused upon his final trial. A *habeas corpus* proceeding is not an "examining trial," nor is the court in which it occurs an "examining court," within the meaning of the Code of Criminal Procedure.

THE facts of the case, which rendered the proposed testimony referred to in the opinion of the greatest importance, are as follows: The defendant and one Jesse Rudder were quarreling about a hack fare, when the defendant called Rudder a lying son of a bitch. The deceased, who was standing near, thereupon addressed profane and vulgar language to the defendant, called upon him to fight, pulled off his coat, and started to rush for the defendant, who then drew his pistol and shot him. Other facts are stated in the opinion.

*William Aubrey, A. W. Houston, and N. O. Green*, for the appellant.

*R. H. Harrison*, assistant attorney-general, for the state.

WARD, S. J. This is a conviction of murder in the second degree, with punishment assessed at confinement in the penitentiary for the term of fifteen years.

A few days before the homicide, two men, by the names of Peter and Walling, pointed out to defendant the deceased, on the streets of San Antonio, as the man who had told them of many exploits of a kind to illustrate his dangerous and desperate character, and of such variety and extent as would tend to cause any person to whom the same were narrated to believe that an assault by deceased would be one calculated to create a reasonable apprehension in the mind of a person attacked by deceased of death or serious bodily harm. Upon the trial, the defendant proposed to prove these facts, but the district attorney objected on the grounds of immateriality and irrelevancy. The court sustained the objection, and refused to admit the testimony. The defendant excepted and reserved a bill of exceptions to this ruling of the court. The facts of this case render this proposed testimony of the greatest importance.

If defendant had reasonable grounds for believing, and did believe, Draper (deceased) a dangerous and violent man, he had the right to act on that belief, whether Draper was such a man, or not.

But can the accused establish the grounds for such belief in the manner proposed? He could prove such a character for the deceased by general reputation, the presumption being that the accused knew of the general reputation.

But suppose that in fact the defendant did not know of the general reputation of his adversary, certainly his conduct should not be judged in the light of the general reputation of his adversary, though ever so bad, for, not knowing such general reputation, his conduct or acts could not in any manner have been influenced or controlled by such reputation: *Grisom v. State*, 8 Tex. App. 386.

In *Brumley v. State*, 21 Tex. App. 240, 57 Am. Rep. 612, it was said by this court: "It is a rule, not only statutory, but almost of universal acceptance, that a party may act upon reasonable appearances of danger, and that whether danger is apparent or not is always to be determined from the defendant's stand-point." If the accused had reasonable grounds for believing, and did believe, that the deceased was a dangerous man, the source of his information or belief is altogether immaterial. The law does not permit testimony to be given of the dangerous character of a deceased, upon the principle of justification, for it is just as much a violation of law to unlawfully kill a man of dangerous or violent character as to

kill a man whose character is that of peace. But such testimony is admissible for the purpose of judging the conduct of the accused from his stand-point, and in the light of all the surrounding facts and circumstances attending the homicide, and as the same appeared to him. In this way alone can you properly determine the motives that controlled and governed his act. If the accused was in fact influenced and controlled by his belief that the deceased was a dangerous or desperate man, what matters it to him whether that belief be occasioned by the general reputation of the deceased, which the accused is only presumed to know, and which in fact he may not know, or whether that belief was generated by the statements of the deceased himself?—the question at last being, Did that belief exist? and was the conduct of the accused influenced by it? It was the province of the jury to pass upon these questions, and they certainly could not do so unless they were in possession of all the facts and circumstances known to the accused, and which he claimed influenced or controlled his conduct.

Mr. Bishop clearly states the rule of law applicable to this question as follows: "Except in capital executions under judicial sentence, no evil in a person, however extreme, will justify or palliate the taking of his life. Therefore, proof of the character, conduct, or utterances of the deceased is not ordinarily admissible in trials for homicide. But as a help to the understanding of motives and purposes, it may be, to a limited extent, in special circumstances, now to be explained. Thus the defendant, to excuse or mitigate his acts, claims that they were in self-defense or passion. The particulars of the transaction being thus material, and the law judging him by the facts and necessities as they appeared to him, whatever they truly were, he may give in evidence anything known to him of the character, prior conduct, threats, or other utterances of the person with whom he was contending, which, not as showing that the man was bad, but that in the special instance and circumstances he was dangerous, might reasonably have place among the considerations guiding his actions": 2 Bishop's Crim. Proc., secs. 609, 610. The testimony of the witnesses Peter and Walling was admissible, and the court erred in excluding it.

It appears from defendant's bill of exceptions that the state introduced and read in evidence, over objection and exception of appellant, the testimony of one Ellis, given before Judge King, on hearing of a writ of *habeas corpus*, and reduced to

writing and signed by Ellis. The appellant objected to this testimony, on the ground, among others, that the same was hearsay, and also objected that a proper predicate had not been laid. Whether a proper predicate had been laid is not a question deemed necessary to be determined here, under the view we take of the case made by the bill of exceptions. The testimony, admitted was of a very important character, and very damaging to appellant; and the question is, whether it was, in the form in which it was offered, such as could be legally admitted at all; or in other words, Is a *habeas corpus* proceeding an "examining trial," and the court in which it occurs an "examining court," within the meaning of article 774 of the Code of Criminal Procedure? It is unnecessary to discuss what the rule is upon this subject at common law, in the state of the record: *Johnson v. State*, 27 Tex. 758. See also article 25 of the Code of Criminal Procedure. Therefore, the material inquiry is, Have we a statute that authorizes the admission of this evidence? It is contended that article 774 of the Code of Criminal Procedure authorizes the admission of such testimony, on proof of the proper predicate being laid, as provided for in articles 772 and 773 of the Code of Criminal Procedure.

Article 774 reads as follows: "The deposition of a witness taken before an examining court or a jury of inquest, and reduced to writing and certified according to law, in cases where the defendant was present when such testimony was taken and had the privilege afforded him of cross-examining the witness, may be read in evidence, as is provided in the two preceding articles for the reading in evidence of depositions." In order for such testimony to be admissible under this article, it is necessary that the same should have been taken before an examining court or a jury of inquest. The next step in the solution of this question is to determine what constitutes an examining court. This question is solved by the statute, for it expressly defines what constitutes an examining court. Article 63 of the Code of Criminal Procedure reads as follows: "When a magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an examining court." Article 26 of the Penal Code reads as follows: "A criminal action, as used in this code, means the whole and any part of the procedure which the law provides for bringing offenders to justice; and the terms 'prosecution,' 'criminal prosecution,' 'accusation,' and 'criminal accusation' are used

in the same sense." Our statutes do not define what a magistrate is, but very clearly state who are magistrates and what their duties are. A magistrate is "a public civil officer invested with some part of the legislative, executive, or judicial power given by the constitution, etc. The President of the United States is the chief magistrate of the nation; the governors are the chief magistrates of their respective states. In a narrower sense, the term only includes inferior judicial officers, such as justices of the peace, etc.": 13 Am. & Eng. Ency. of Law, 1198, 1199.

Article 42 of the Code of Criminal Procedure is as follows: "Either of the following officers is a magistrate within the meaning of this code: The judges of the supreme court, the judges of the court of appeals, the judges of the district court, the county judge of the county, either of the county commissioners, the justices of the peace, the mayor or recorder of an incorporated city or town."

Article 43 of the Code of Criminal Procedure is as follows: "It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means, in order that they may be brought to punishment."

In order for a court to be an examining court within the meaning of the statute under discussion, we think that a magistrate must preside as a magistrate for the purpose of inquiring into a criminal accusation preferred against a person on trial, and this duty must be enjoined upon him as a magistrate by the law; that those judges who have the power to issue the writ of *habeas corpus* do not have this power because they are magistrates, but they possess this power because it is conferred upon them by the constitution. Judges of the supreme court have the power to act as magistrates, to cause offenders to be arrested and bound, over or discharged. They do not do this as judges of the supreme court, but as magistrates authorized to perform these acts. Yet, notwithstanding they are magistrates in the performance of these acts, they cannot issue the writ of *habeas corpus*. The judge of the district court can entertain a complaint against a citizen, can have a trial upon it, can admit to bail, discharge, or commit to jail the offender; but in performing these duties he acts, not as judge of the district court, but as a magistrate. A justice of the peace is, *ex officio*, a notary public; but when he is per-

forming a judicial duty, he acts as a justice of the peace, and not as a notary public. Any magistrate, whether he be a judge of the supreme court or the mayor or recorder of an incorporated town or city, has the power to hold an examining court, but no magistrate, as such, has been given the power to issue the writ of *habeas corpus*. "A writ of *habeas corpus* is an order issued by a court or judge of competent jurisdiction, directed to any one having a person in his custody or under his restraint, commanding him to produce such person at a time and place named in the writ, and show why he is held in custody or under restraint": Code Crim. Proc., art. 131. "The court of appeals or either of the judges, the district courts or any judge thereof, the county courts or any judge thereof, have power to issue the writ of *habeas corpus*, and it is their duty, upon proper application, to grant the writ under the rules herein prescribed": Code Crim. Proc., art. 135. In issuing the writ of *habeas corpus*, the act is that of the court or of the judge of the court, and not the act of a magistrate, and the trial upon the same is not an examining court held by a magistrate, but is a trial before a court or the judge of the court. The objects and purposes of an examining court and a *habeas corpus* proceeding are essentially different. In the former, the object is to determine whether a person who is accused of an offense is guilty, and whether he should be discharged or bailed. In the latter, the object is to determine whether the citizen is unlawfully restrained of his liberty. In the former, the proceedings are in an examining court before a magistrate; in the latter, before a court or the judge of a court to whom, in the particular matter, jurisdiction is specifically given. These views are in accord with a previous decision of this court. In the case of *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188, occurs this language: "After providing generally for the jurisdiction of justices, the constitution declares that they may have 'such other jurisdiction, criminal and civil, as may be provided by law, under such regulations as may be prescribed by law': Const., art. 5, sec. 19. In prescribing their powers and jurisdictions, article 1543 of the Revised Statutes provides that 'they shall also have and exercise jurisdiction over all other matters not hereinbefore enumerated that are or may be cognizable before a justice of the peace under any law of this state.' With regard to the final trial of causes coming within his jurisdiction, whether civil or criminal, the statute evidently contemplates that the action and jurisdiction of the justice

court shall be limited by and to his precinct, unless otherwise expressly authorized by the law in certain exceptional cases. But he is, furthermore, a 'magistrate,' made so by the terms of the statute equally with the judges of the supreme court, court of appeals, district and county judges: Code Crim. Proc., art. 42; and when a magistrate sits for the purpose of inquiring into a criminal accusation against any person, this is called an 'examining court': Code Crim. Proc., art. 63. At such time he is a 'magistrate,' and not a 'justice of the peace,' and his court an 'examining' and not a 'justice court.' A warrant of arrest may be issued by a magistrate: Code Crim. Proc., art. 232; and when issued by a judge of the supreme court, court of appeals, district or county court, shall extend to every part of the state: Code Crim. Proc., art. 237. But when issued by any other magistrate, it cannot be executed in any other county, except in certain instances mentioned: Code Crim. Proc., art. 238. It may, however, be issued to and executed anywhere in his county outside of as well as in his own precinct. When sitting as an 'examining court,' the law nowhere limits the magistrate, if he be a justice, to his particular precinct; and not being in this regard, there is no reason why it was not intended he should hold the court in any portion of the county most convenient for the purpose of the examination as to the commitment or discharge of the accused (Code Crim. Proc., c. 111), whether the place of the sitting be in the precinct of another justice competent and qualified to act, or not."

From this decision it is manifest that a justice of the peace has a dual character. Those matters conferred upon him and to be exercised by him as a justice of the peace constituting one, and those conferred upon him to be exercised by him as a magistrate constituting the other. This is equally so of the judges of the supreme, district, and county courts. The judges of the supreme court are magistrates, but cannot issue the writ of *habeas corpus*. The judges of the district courts are magistrates and can issue the writ of *habeas corpus*. Is this by virtue of any power given to magistrates? Most certainly not. It is by virtue of the power given them as courts, or judges thereof. Then, in the exercise of this power, it follows that the writ is issued by a court, or the judge thereof, and not by a magistrate, and the proceeding is not in an examining court and is not carried on before a magistrate. Article 774 contemplates that the testimony should be reduced to writing and certified according to law, etc. Article 267 of the Code of Criminal Pro-



cedure, which relates to an examining trial before a magistrate, requires the testimony to be reduced to writing, signed by the witness, and certified to by the magistrate taking the same. We can find no such provision relating to a *habeas corpus* trial before a court or judge, and this fact strengthens our view that article 774 was not intended to embrace the testimony taken before a judge on *habeas corpus* trial: *Evans v. State*, 12 Tex. App. 388.

We are of the opinion that the testimony of the witness Ellis taken before the judge on *habeas corpus* trial was not admissible in evidence, and the court erred in admitting the same.

We have carefully considered all the evidence contained in the record, but in view of the disposition made of this case we do not deem it necessary to say whether, in our opinion, the testimony is sufficient or not to support a conviction for murder in the second degree.

For the errors discussed in this opinion, the judgment is reversed and the cause remanded.

WHITE, P. J. , I fully concur in the views of the majority of the court reversing this case on account of the court below permitting the introduction of the testimony of the two witnesses Peter and Walling, and I fully agree that the case should be reversed for the errors discussed in the opinion, except with regard to the ruling of the court on the admission of the written testimony of the witness Ellis taken in writing on the *habeas corpus* trial. I do not concur in the views expressed as to this testimony and its admissibility, and regret that the limited time of the present term precludes me from giving as full and thorough an investigation and discussion of the subject as its merits require. I believe that this testimony was admissible under article 774 of the Code of Criminal Procedure, which provides that a deposition of a witness taken before an examining court or a jury of inquest and reduced to writing and certified according to law, in cases where the defendant was present when such testimony was taken and had the privilege afforded him of cross-examining the witness, may be read in evidence, as provided in the two preceding articles for the reading in evidence of depositions. The word "deposition," as used in this article, is manifestly a mistake for the word "testimony" or "evidence": *Kerry v. State*, 17 Tex. App. 178; 50 Am. Rep. 122.

Article 772, one of the articles referred to, prescribes the circumstances under which such testimony may be read, and where either one of these circumstances is established as a predicate, the testimony is permitted to be used.

In the case in hand, the objection to the admissibility of Ellis's testimony was not to its competency and admissibility as such, but was based upon the fact that a sufficient and proper predicate had not been laid under the provisions of article 772. When one of the predicates in article 772 has been established, the evidence taken before an "examining court" is made admissible by the provisions of article 774. It is objected that the evidence was not taken before such court as is contemplated in said article, to wit, an "examining court"; and the question is, whether or not a *habeas corpus* proceeding is "an examining trial," and whether or not the court in which it occurs is such an "examining court," coming within the meaning of said article. It will be observed that the article in question, so far as the question here raised is concerned, only requires the evidence to have been taken before "an examining court" and reduced to writing.

Now, what is an "examining court"? Our statute defines it to be a proceeding before a magistrate for the purpose of inquiring into a criminal accusation against any person. The Code of Criminal Procedure, article 63, and article 42 of the Code of Criminal Procedure, declares that magistrates, within the meaning of the code, are justices of the supreme court and court of appeals, district and county judges, county commissioners, and justices of the peace.

A criminal accusation is defined by articles 25 and 26 of the Penal Code to be the whole or any part of the procedure which the law provides for bringing offenders to justice.

It is a familiar rule, that in construing a statute, in order to arrive at its true meaning or the effect and scope of any term used therein, all statutes bearing upon the same subject and having relation thereto must be taken and considered together and construed in connection with the particular one under consideration. Applying this rule, we find the article in question simply employs the words "examining court" in their broad and comprehensive sense. There is nothing in the article to indicate that the term as there used was intended to be restricted to a court over which a justice of the peace presides; and when, as in this case, we have a statute defining "examining court" and the officers who are qualified to preside over

the same, it would be doing violence to both the language and the spirit of the article under consideration, when it simply uses the words "examining court," to say that these words are to be limited and restricted to an "examining court" presided over by a particular one of the several officers qualified in law to preside over the same. That a *habeas corpus* trial is a proceeding in an "examining court" cannot be successfully controverted and ought not to admit of doubt. The statute says that an "examining court" is where a magistrate sits to inquire into an accusation against any person. The sole inquiry in a *habeas corpus* proceeding where a person is restrained and held on a charge of crime is, Does the evidence show that the accused has committed any offense which requires him to be restrained of his liberty?

The very gist of the inquiry is the existence and sufficiency of the accusation of crime against the accused. Therefore, if upon the hearing it is developed that the defendant has committed no offense, he is released and discharged; if the contrary be developed, he is bound over as required by law to await the trial upon the merits. In this respect the proceedings are not at all dissimilar from those had before an examining court presided over by a justice of the peace. In an examining trial on *habeas corpus*, like an examining trial before a justice of the peace, the proceedings, including all the testimony, are reduced to writing, certified to, and filed in the proper court: Code Crim. Proc., arts. 181, 182, 267.

By article 170 of the Code of Criminal Procedure, the court is required to examine the writs and papers attached to it, and if no legal cause for the imprisonment or restraint appears, it is required that the appellant shall be discharged. By article 171, it is expressly provided that if the party stands indicted for a capital offense, the judge or court shall nevertheless hear such testimony as may be offered on the part both of the applicant or the state, and may either remand the defendant or admit him to bail, as the law and the facts of the case may justify.

Article 174 provides for the action of the court upon examination, and declares that the judge or court, after having examined the return and the documents attached, and heard the testimony offered on both sides, shall, according to the facts and circumstances of the case, proceed either to remand the party into custody, admit him to bail, or discharge him, pro-

vided that defendant shall not be discharged after indictment without bail.

Article 176 declares that where, upon an examination under *habeas corpus*, it shall appear to the court or judge that there is cause to believe that an offense has been committed by the prisoner, he shall not be discharged, but shall be committed or admitted to bail, according to the facts and circumstances of the case.

Article 181 requires the proceedings to be entered of record.

Article 182, if the proceedings are had in vacation, requires that the proceedings shall be written. The judge shall require the proceedings to be written and certify to the same, and file with the clerk of the court having jurisdiction of the offense.

Article 188 provides that if the accusation against the defendant for a capital offense has been heard on *habeas corpus* before indictment found, and he shall have been committed after such examination, he shall not be entitled to the writ, unless, etc.

I have cited the above provisions from our statute to show that a judge or court, when hearing a *habeas corpus* proceeding, sits as an examining court or examining magistrate. The proceedings on the trial are denominated and characterized throughout as "an examination."

In his work on *habeas corpus*, Mr. Church says: "In ordinary criminal proceedings, commitments are seldom made, comparatively speaking, by courts of general jurisdiction. By statute, however, in some of the states, the judges of the courts of general jurisdiction are made magistrates, and are vested with the authority to hold accused persons to answer. Commitments made by these magistrates are undoubtedly entitled to more consideration than a commitment made by an ordinary justice of the peace": Church on Habeas Corpus, p. 304, sec. 238.

My views as to this matter are fully sustained by the opinion of Judge Willson, a late and most distinguished and honored member of this court, in the case of *Evans v. State*, 12 Tex. App. 370. In that case the state was permitted to produce orally the testimony of a witness as it had been given in a previous examination of the case on *habeas corpus*. The objection to the introduction of the testimony was, that a proper predicate for its admission was not laid, as provided by our statute: Code Crim. Proc., art. 772.

No question was raised to the admissibility or competency of such testimony had the predicate been properly laid, and

the inevitable conclusion from Judge Willson's opinion is, that had the predicate been properly and sufficiently laid, such testimony would have been competent and admissible. He nowhere expresses the slightest doubt as to the competency of such evidence if the proper predicate for its introduction had been laid.

So far as I have been able to ascertain, the practice in the courts of this state has always been uniform in the admission of such testimony, where the proper predicate for its introduction has been laid, and so far as I know, the question of its competency and admissibility is raised for the first time in this case, not indeed by the attorneys who objected to the admission of the testimony in the court below, but by the opinion of the majority of the court, which goes beyond and outside of the objections which were presented.

If the opinion of the majority of this court in this case be correct, then we have no statute providing a rule for the reproduction of testimony which has been given on a *habeas corpus* trial, and unless such testimony can be availed of by some other legitimate means already provided for in the code, it would be well for our legislature to supply this defect in the laws of our state, for we can readily imagine innumerable instances in which, if such be the rule, justice will be frustrated and the vindication of the law rendered impossible. If, however, the rule laid down by a majority of the court be correct, then it may be well to consider whether or not such evidence is not legitimate and admissible under other provisions of our Code of Criminal Procedure. If we have no express statute regulating the matter, then our code provides that "whenever it is found that this code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern": Code Crim. Proc., art. 27. And again: "The rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state, except where they are in conflict with the provisions of this code or some statute of this state": Code Crim. Proc., art 725. "The English practice under 2 and 3 Philip and Mary, chapter 10, always was to read the depositions of witnesses taken upon oath in the presence of the prisoner and the magistrate before whom he had been brought on a charge of felony, and to give them in evidence on the trial of an indictment for the same felony, if it were proved on oath, to the satisfaction of the court,

that the witness was dead. . . . So it has been said, if due diligence has been used, and it is made manifest that the witness has been sought for and cannot be found, or if he be found and fell sick by the wayside, his deposition may be read, for that in such case he is in the same circumstances as to the party that is to use him as if he were dead": 1 Archbold's Crim. Pr. & Pl.; Pomeroy's Notes, 8th ed., pp. 454, 455, note 1, citing B. N. 239; Hawk. P. C., b. 2, c. 46, sec. 18.

If it be true that we have no rule of procedure with regard to the testimony had on *habeas corpus* proceedings as to its admissibility on the future trial of the case, then, under the foregoing authorities, such evidence could be admitted under the rules and procedure of the common law, and would be legitimate evidence, because it cannot be said there is any express provision of our code which would be in conflict with such procedure. But, as stated above, in my opinion, the evidence was admissible under the provisions of the Code of Criminal Procedure, articles 772, 774, and so believing, I am constrained to dissent from the opinion of the majority of the court holding otherwise.

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**HOMICIDE — EVIDENCE OF BAD CHARACTER OF DECEASED.** — In cases of homicide, evidence of the general bad character of the deceased is admissible only where the plea of self-defense is interposed. In that case, evidence of his character for violence, vindictiveness, and treachery may be shown, where it reasonably appears that the prisoner knew of such character: *State v. Turner*, 29 S. C. 34; 13 Am. St. Rep. 706, and note, in which the cases are collected; *Pritchett v. State*, 22 Ala. 39; 58 Am. Dec. 250, and note; *Walker v. State*, 28 Tex. App. 503. Where the jury is left in doubt as to who the probable aggressor was, evidence of the bad character of the deceased may be considered: *State v. Spendlove*, 44 Kan. 1. Evidence to sustain the character of the deceased cannot be given by the prosecution, unless it is attacked by the defense: *People v. Powell*, 87 Cal. 343.

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## RAHM v. STATE.

[80 TEXAS APPEALS, 318.]

**INDICTMENT — MOTION TO QUASH, BECAUSE TAMPERED WITH, PROPERLY DENIED WHEN.** — A motion made on oath to quash an indictment, upon the ground that it has been tampered with by being interlined and amended as to material matters by some one whose handwriting is different from that of the clerk, district attorney, or foreman of the grand jury, is properly overruled, where, upon the motion being called, the defendant refuses to introduce any evidence or witnesses in support of the matters of fact therein alleged to be true, and the court, of its own motion, then

calls and examines, under oath, witnesses as to such matters of fact, and finds the allegations to be untrue and not warranted by the facts.

**PERJURY — MATERIAL ALLEGATION IN INDICTMENT FOR.** — Where an indictment for perjury charges that the accused committed perjury by swearing that he did not execute a certain order in writing, which is set out *in hæc verbis* in the indictment, it is not necessary that the indictment should allege the materiality of such order, the execution of the instrument, and not the instrument itself, being the material subject of inquiry before the grand jury.

**BILLS OF EXCEPTIONS MUST SHOW ERRORS COMPLAINED OF.** — Bills of exception to the admission or exclusion of evidence, to be entitled to the consideration of the appellate court, must show the errors complained of by the appellant.

**ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS BETWEEN, WHAT IS NOT.** — Where an attorney at law prepares and writes an order for the defendant to sign, which the defendant subsequently swears that he did not sign, such attorney is a competent witness to prove its execution by the defendant, and the rule of privileged communications as between attorney and client does not apply in such a case.

**IMPROPER ARGUMENT OF COUNSEL NOT GROUND OF REVERSAL WHEN.** — Improper and unwarranted remarks of prosecuting counsel in argument in a criminal case, though always reprehensible, do not constitute cause for reversal, unless, under all the circumstances of the case, they were calculated to prejudice the rights of the accused.

**CHARGE AS TO MATERIALITY OF ISSUE IN PERJURY — WHAT SUFFICIENT.** — A charge in which the jury are expressly told that the matter assigned as perjury was a material issue before the grand jury is sufficient.

**INDICTMENT for perjury.** The opinion states the case.

*W. H. Brooker*, for the appellant.

*R. H. Harrison*, assistant attorney-general, for the state.

**WHITE, P. J.** Appellant was convicted in the court below upon an indictment charging him with perjury.

A preliminary motion was made to quash the indictment, mainly upon the ground that it had been tampered with by being interlined and amended as to material matters by some one whose handwriting was different from that of the clerk, district attorney, or foreman of the grand jury. This motion to quash was sworn to. In the order overruling the same it was recited that when the motion was called the defendant refused to introduce any evidence or witnesses in support of the matters of fact therein alleged to be true, and the court, of its own motion, having witnesses called and examined, under oath, as to said matters of fact, and after hearing the evidence, being of opinion that the allegations were untrue and not warranted by the facts, ordered that said motion to quash be overruled on account of the absolute falsity contained in the affidavit.

After the trial and conviction, a motion in arrest of judgment was filed by defendant, based upon supposed defects in the indictment, all of which seem to be complaints urged against the sufficiency of the indictment because it did not charge the materiality of a certain written order set out *in hæc verba* in said indictment, and because it did not charge that said written order was a material issue in the case.

Defendant's counsel seems to have misapprehended the case as made by the indictment. The matter before the grand jury, which was the material inquiry, was, whether or not the defendant, Rahm, had executed and given the order or instrument in writing set out; and it is alleged that that inquiry was necessary to a due administration of the criminal laws of the state. It was not necessary to allege the materiality of the order itself in terms, but the issue, and the material issue, on inquiry before the grand jury was, whether Rahm signed said order or not. It was the execution of the instrument, and not the instrument itself, which was the subject of inquiry. The matter is most plainly, clearly, and sufficiently charged in said indictment, and said indictment, as a charge for perjury, assigned upon the denial, under oath, by a party before the grand jury, that he had executed a certain instrument in writing therein set forth, is in exact conformity with approved precedents in this state, and contains all the necessary allegations required under our statutes and said approved forms: Willson's Criminal Forms, No. 121; *Jackson v. State*, 15 Tex. App. 579. The court did err in either overruling defendant's motion to quash or his motion in arrest of judgment based upon supposed defects in the indictment, said indictment being good and sufficient in law.

With regard to defendant's first and second bills of exceptions, we deem it only necessary to say that the bills are so indefinite and uncertain in stating the matters complained of that we cannot pass upon them intelligently, and therefore cannot see that any error has been committed: Willson's Crim. Stats., secs. 2368, 2516.

Defendant's third and fifth bills of exceptions are unintelligible to us, and do not show, in and of themselves, what the error is which defendant proposes to complain of. From the bills themselves, it is, moreover, not made to appear how the questions asked, and which were excluded by the court, were or could in any manner be relevant and pertinent to the case



on trial. This should have been done, in order to entitle the bills to consideration.

Defendant's fourth bill of exceptions was an objection urged to the competency of a witness, Oscar Bergstrom, who was permitted to testify over defendant's objection. The objection of defendant to this witness was, that he was incompetent because he was attorney, counsel, and legal adviser of the defendant before, at the time the order purports to have been made, and long after, and that his evidence should not be used against his client. In signing this bill of exceptions the learned judge refers us to the statement of facts, which shows that no such relation as that of attorney and client existed at the time of the alleged offense.

It is further shown by said statement of facts that the order which the defendant denied before the grand jury had been executed by him, and upon which denial the perjury is assigned, had been prepared and written by Bergstrom for the defendant to sign. Defendant denied that he signed it, and claimed before the grand jury, as we understand it, that his signature to said instrument was a forgery. Bergstrom was introduced by the state to prove that defendant did sign, and the facts and circumstances connected with defendant's signing the instrument. Under all the evidence developed in regard to the matter, the rule of privileged communication, as between attorney and client, did not and could not obtain in such a case, and the court did not err in overruling the objections to the testimony.

From the defendant's bill of exceptions No. 8, we are unable to see how the matters proposed to be shown were either relevant or pertinent to the issues upon trial, and we cannot say that the court committed any error in this instance.

Defendant's tenth bill complains of the language of the district attorney, used in his closing argument, wherein he stated that "the defendant was a perjurer; that he swore as false as hell in another matter in this court." In certifying this bill, the learned trial judge says: "The court does not remember the remark, but defendant's counsel excepted to something the district attorney did say in his argument."

"Improper and unwarranted remarks of prosecuting counsel in argument, although always reprehensible, do not constitute cause for reversal, unless, under all the circumstances of the case, they were calculated to prejudice the rights of the accused: *Walker v. State*, 28 Tex. App. 503; and it seems a con-

viction will not be set aside for this cause unless the defendant requested and was refused an instruction directing the jury to disregard the unauthorized statements of counsel for the state": *Young v. State*, 19 Tex. App. 536; *Kennedy v. State*, 19 Tex. App. 618; Willson's Crim. Stats., sec. 2321.

Defendant's eleventh bill complains of the overruling of his motion for a new trial, which motion for new trial is in the main a recapitulation of the matters complained of in his bills of exception, and, in addition thereto, some complaints against the charge of the court. We are of opinion that the charge of the court was a very clear and full exposition of the law applicable to the case as made by the evidence, and it is not obnoxious to the objection that the court submitted the question of the materiality of the issue to be determined by the jury, instead of determining it himself, for we find the following instruction in the charge, to wit: "Whether the signature to the instrument set forth in the indictment and in evidence before you, dated June 16, 1888, was a forgery or otherwise, was a material issue, if the same was under investigation by the grand jury. . . . The true test as to materiality is, whether the statement of the witness could have probably influenced the tribunal upon the question at issue and being investigated by it. If it tended to do so, it is material; the degree of materiality is of no importance; if it be material to a single fact, it is sufficient." Here the jury are expressly told that the matter assigned as perjury, to wit, whether the defendant signed and executed the instrument or not, was a material issue before the grand jury. No special instructions in addition to the main charge were requested for the defendant.

We have given this case our most careful consideration, and upon the record as it is presented to us, we find no error for which the judgment should be reversed, and it is therefore affirmed.

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**PERJURY—INDICTMENT FOR—SUFFICIENCY OF.**—In charging perjury under the South Carolina statute, it is not necessary to allege that the false swearing was material to the issue: *State v. Byrd*, 28 S. C. 18; 18 Am. St. Rep. 680, and note. An indictment charging generally that the false oath was material to the trial of the issue upon which it was taken is sufficient without showing how it was material: *State v. Mumford*, 1 Dev. 519; 17 Am. Dec. 573, and note; *Sisk v. State*, 28 Tex. App. 432; *State v. Gonsoulin*, 42 La. Ann. 579; *Barnett v. State*, 89 Ala. 166. The degree of materiality is not important: *Williams v. State*, 28 Tex. App. 301. An indictment for perjury which fails to show on its face that the alleged willful misstatement was

material to the issue is fatally defective: *Marvin v. State*, 53 Ark. 395; *Young v. People*, 134 Ill. 37; see note to *State v. Shupe*, 85 Am. Dec. 498.

**ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS — WHAT ARE NOT.** — An attorney employed as scrivener to draw up a deed may testify concerning what comes to his knowledge during the transaction: *De Wolf v. Strader*, 26 Ill. 225; 79 Am. Dec. 371, and note. Acts and transactions of a client done in the presence of an attorney may be testified to by the latter: *Coveney v. Tannahill*, 1 Hill, 33; 37 Am. Dec. 237, and note; see note to *Harris v. Daugherty*, 15 Am. St. Rep. 818.

**APPEAL — IMPROPER ARGUMENT OF COUNSEL AS GROUND OF REVERSAL.** — If counsel for the prosecution refers to facts not in evidence, and on objection the court instructs the jury to disregard such reference, and counsel himself asks the jury to ignore it, a judgment of conviction will not be set aside because of such improper remark: *Cheatham v. State*, 67 Miss. 335; 19 Am. St. Rep. 310, and note. Erroneous inferences drawn by counsel from the evidence and stated in their addresses to the jury, or mistaken opinions of law expressed by them, do not entitle the complaining party to a new trial: *Sage v. State*, 127 Ind. 15. Improper and unwarranted remarks by the prosecuting counsel in his argument, though reprehensible, do not constitute grounds of reversal, where, under the circumstances, the rights of the accused were not prejudiced: *Walker v. State*, 23 Tex. App. 503. A statement by the prosecuting attorney, in his argument to the jury in a trial for homicide, that the people were not bound by the testimony of a witness whose testimony they were bound to introduce, except so far as it was believed to be true, is not objectionable: *People v. Harper*, 83 Mich. 273.

Where the prosecuting attorney in a criminal case is permitted to state facts to the jury not in evidence, and comment upon them in his argument, to the prejudice of the accused, a new trial should be granted, though the jury were instructed to disregard the statements and comments of the counsel as to matters not in evidence: *People v. Ah Len*, 92 Cal. 282; 27 Am. St. Rep. 103, and note. See also *Bennett v. State*, 86 Ga. 401, 22 Am. St. Rep. 465, and note, *People v. Aiken*, 66 Mich. 460, 11 Am. St. Rep. 512, and note, and extended note to *McDonald v. People*, 9 Am. St. Rep. 559, for discussions of this subject.

**BILL OF EXCEPTION — CONTENTS OF.** — The bill of exceptions should be so full in its statements that the errors complained of appear from the allegations of the bill itself: *Quintana v. State*, 29 Tex. App. 401; 25 Am. St. Rep. 730.

## HURLEY v. STATE.

(80 TEXAS APPEALS, 322.)

**LARCENY OF DOG PUNISHABLE AS FELONY UNDER TEXAS STATUTE WHEN.**

— A dog comes within the term "domesticated animal," in the statute of Texas, and, as such, may become the subject of theft; and where the value of the dog stolen is at least fifty dollars, his theft is a felony under the statute.

**SELF-SERVING DECLARATIONS OF DEFENDANT PROPERLY EXCLUDED.** — Where testimony offered by the accused is self-serving declarations, the court does not err in excluding it.

INDICTMENT for stealing a dog. The opinion states the case.

*McGinnis and Davis*, for the appellant.

*R. H. Harrison*, assistant attorney-general, for the state.

WHITE, P. J. This appeal is from a conviction in the court below for stealing a dog. As charged in the indictment, the offense (omitting the formal parts) is stated as follows, to wit: That Henry Hurley, "on the seventh day of the month of April, 1891, in said county of Bexar and state of Texas, did then and there fraudulently steal, take, and carry away from the possession of Charles Perner a domesticated animal, to wit, one dog, of the value of fifty dollars, the property of the said Charles Perner," etc. At the trial, appellant was convicted of the theft as alleged, and his punishment assessed at two years' confinement in the state penitentiary.

No question was raised in the court below upon the sufficiency of the indictment, in that it did not state an offense against the laws of this state, nor does counsel representing appellant by printed brief in this court in any manner question the legality of the prosecution and conviction, but their contention as to errors is based solely upon matters arising at the trial. So far as we are aware, this is the first conviction in this state of a felony for stealing a dog, and owing to the rule as it obtained at the common law and the contrariety of decision by the American courts upon the subject, we deem it not inappropriate to determine in the first instance whether or not it is a felony under our present statutes to steal a dog. In the case of *State v. Marshall*, 13 Tex. 58, Mr. Justice Wheeler says: "By the common law, though a man may have such property in these animals as to entitle him to maintain a civil action for an injury done to them, yet as they are not classed among valuable domestic animals, as horses and other beasts of burden, nor among animals *domitæ naturæ* which serve for food, as neat cattle, swine, poultry, and the like, the property in them is considered of so base a nature, and they are held in so little estimation as property, that the stealing of them does not amount to larceny: 4 Bla. Com. 236; 1 Hale P. C. 512. But by the statute in England, very severe penalties are inflicted for the crime of stealing a dog: 4 Bla. Com. 236, note. And in some of the states, dogs are by statute placed upon the same footing as other personal property: Wharton's Crim. Law, tit. Larceny; *Heisrodt v. Hackett*, 34 Mich. 283; 22 Am. Rep. 529. We have in this state no stat-

ute upon the subject." And in the case of *Ex parte Cooper*, 3 Tex. App. 489, which was a case involving the constitutionality of the dog-tax law, after quoting the above extract from Judge Wheeler in Marshall's case, it was said: "At the time that decision was made, there was no statute making it malicious mischief to kill a dog, but such animals have since been included in that particular statute: Paschall's Digest, art. 2344. Besides that statute, we know of no other recognizing them (in terms) among the domestic animals or as property. These authorities, we think, settle the first proposition, and to the effect that, in law, dogs are not recognized as other property and subject to an *ad valorem* taxation."

Mr. Bishop says, animals *feræ naturæ*, when reclaimed, become subjects of larceny, provided they are fit for food, and not otherwise; and he says: "Of animals of which, when reclaimed, larceny may be committed within the foregoing rules, are pigeons and doves, hares, conies, deer, swans, wild boars, cranes, pheasants, and partridges; to which may be added fish for food, including, undoubtedly, oysters. Of those of which there can be no larceny, though reclaimed, are dogs, cats, bears, foxes, apes, monkeys, polecats, ferrets, squirrels, parrots, singing-birds, martins, and coons. Though animals of the latter class may, when reclaimed, have a recognized value, and the right of property in them be protected in civil jurisprudence, it is otherwise in criminal, on the ground, probably, that anciently they were deemed of no determinate worth, and thus was established a rule which the courts could not afterward change": 2 Bishop's Crim. Law, secs. 771, 773. In our state courts, dogs have been so far regarded as property that civil actions for damages for negligently and willfully killing them have been sustained: *Railway v. Holden*, 3 Ct. App. C. C. 328; *St. Louis etc. R'y Co. v. Hawks*, 78 Tex. 300.

Our penal statutes with regard to theft bearing upon this question are as follows: "Theft is the fraudulent taking of corporeal personal property belonging to another," etc.: Pen. Code, art. 724. "The property must be such as has some specific value which can be ascertained. It embraces every species of personal property capable of being taken": Pen. Code, art. 725. Within the meaning of "personal property" which may be the subject of theft are included all domesticated animals and birds, when they are proved to be of any specific value: Pen. Code, art. 733. Theft of the value of twenty dollars or over shall be punished by confinement in

the penitentiary not less than two nor more than ten years: Pen. Code, art. 735. In article 748 of the Penal Code, theft of sheep, hogs, and goats is specifically named as an offense, with the penalty affixed. It will be noted that our statute above quoted (article 725) embraces every species of personal property capable of being taken, and includes all domesticated animals: Arts. 725, 733; and in addition to those statutes relating to theft, by article 679 of the Penal Code, punishing malicious mischief, it is expressly made an offense to "willfully kill, maim, wound, poison, or disfigure any horse, ass, mule, cattle, sheep, goat, swine, dog, or other domesticated animal," etc. In the case of *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423, under a statute which provided for killing or wounding "domestic animals," it was held that dogs were not domestic animals, and that a prosecution would not lie. We might, if necessary, draw the distinction between "domestic" and "domesticated," as used in our statute *supra*; but we do not deem it necessary to do so.

We quote approvingly the following language used by Appleton, C. J., dissenting from the opinion of the court in that case: "A dog is the subject of ownership. Trespass will lie for an injury to him. Trover is maintainable for his conversion. Replevin will restore him to the possession of his master. He may be bought and sold. An action may be had for his price. The owner has all the remedies for the vindication of his rights of property in this animal as in any other species of personal property he may possess. He is a domestic animal. From the time of the pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been, there has been his dog. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master, accompanying him in his walks, his servant, aiding him in hunting, the playmate of his children, an inmate of his house, protecting it against all assailants. It may be said that he was *feræ naturæ*; but all animals, naturalists say, were originally *feræ naturæ*, but have been reclaimed by man, as horses, sheep, or cattle; but however tamed, they have never, like the dog, become domesticated in the home, under the roof, and by the fireside of their masters. . . . In the present case the Newfoundland dog Rich, of the value of one hundred dollars,

was 'in the inclosure and immediate care of his master.' He was domesticated. Whether the property of the master was originally of a qualified nature or not is immaterial. The dog was under his dominion and control. 'While thus qualified property continues, it is as much under the protection of law as any other property, and every invasion of it is redressed in the same manner': 2 Kent's Com. 349." "A dog, being a 'domestic animal,' and property, an indictment is maintainable, under section 1, chapter 127, of the Revised Statutes, for his malicious destruction. When the statute made malicious mischief indictable, it was held that a dog was the subject of absolute property, and the killing of one, under the act prohibiting malicious mischief, was an indictable offense": *State v. Sumner*, 2 Ind. 377. "There is such property in dogs as to sustain an indictment for malicious mischief: *State v. Latham*, 18 Ired. 83. In *State v. McDuffie*, 34 N. H. 523, 69 Am. Dec. 516, which was, like this, for maliciously shooting a dog, Fowler, J., says: 'We can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the willful and malicious injury of the reckless and malignant as property in fruit, shade, or ornamental trees, whether standing in the garden or yard of their owner, or in a public street or square, or any other species of personal property.' Dogs have been included under 'property,' and their malicious destruction has been held indictable: 2 Wharton's Crim. Law, 1082. *A fortiori* is it so when the owner is subject to taxation for his dog."

In the case of *Mullaly v. People*, 86 N. Y. 365, which was a case for stealing a dog, it was held that the term "personal property," as used in the New York statute, included dogs, and that the stealing of a dog was therefore larceny under said provision. In the opinion it is said: "At common law, the crime of larceny could not be committed by the feloniously taking and carrying away a dog"; citing authorities. After which it is said: "The reason generally assigned by common-law writers for this rule as to stealing dogs is the baseness of their nature, and the fact that they were kept for the mere whim and pleasure of their owners. When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history (5 Motley's Dutch Republic, 398), and the faithful St. Bernards which, after a storm has swept over the crests and sides of the Alps, start out in search of lost travelers, the claim that the

nature of a dog is essentially base, and that he should be left a prey to every vagabond who chooses to steal him, will not now receive ready assent. In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, a source of solace after serious labor, exercising a refining and elevating influence, and yet they are as much under the protection of the law as chattels purely useful and absolutely essential. This common law was extremely technical, and can scarcely be said to have a sound basis to rest on. While it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog, and to steal many animals of less account than dogs. . . . The artificial reasoning upon which these rules were based are wholly inapplicable to modern society. *Tempora mutantur et leges mutantur in illis*. Large amounts of money are now invested in dogs, and they are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property. If the common-law rule referred to ever prevailed in this state, we have no doubt it has been changed by legislation." In the case of *State v. Yates*, 10 Crim. Law Mag. 439, there is a very learned opinion on the same subject, and it was held therein that "a dog is 'a thing of value,' and may be stolen, and burglary may be committed by breaking and entering with intent to steal a dog."

So we see that in other states the larceny of a dog has been held punishable upon the ground that he is a "domestic" animal; that he is "personal property" and a "thing of value." We think that under our statute there can be no question but that the dog would come within the terms "domesticated animal," and, as such, become the subject of theft. In the case before us the dog was a fine pointer, which was shown to be worth at least fifty dollars, and, as such, his theft would be under our statute a felony.

Defendant's only bill of exceptions was taken to the refusal of the court to allow him to prove a conversation between the witness Cooper and himself, relating to the dog, the day after the dog was alleged to have been stolen. The bill of exceptions is defective in not stating or setting out what was expected to be proved by Cooper, and it appears that the court sustained the state's objection to the evidence, because it proposed to introduce statements of the defendant which were self-serving declarations. We cannot see from the bill itself



that any error was committed. If the proposed testimony offered was self-serving declarations, the court unquestionably did not err in excluding it: *Harmon v. State*, 3 Tex. App. 51; *Robinson v. State*, 3 Tex. App. 256. We have found no other matters requiring a discussion, and no error for which a reversal would be warranted being made to appear, the judgment is affirmed.

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**LARCENY — DOGS AS SUBJECTS OF.** — A dog is the subject of larceny, where personal property is defined as "goods and chattels": *State v. Brown*, 9 Baxt. 53; 40 Am. Rep. 81, and note. See also *Harrington v. Miles*, 11 Kan. 490; 15 Am. Rep. 355, and note. Dogs are property, and the owner may recover damages against a trespasser injuring them: *Heiligman v. Rose*, 81 Tex. 223; 26 Am. St. Rep. 804, and note. The law recognizes property in dogs: *Mayor v. Meigs*, 1 McAr. 53; 29 Am. Rep. 578, and note.

**EVIDENCE — DECLARATIONS OF ACCUSED IN HIS FAVOR — WHETHER ADMISSIBLE.** — The declarations of a defendant after the commission of a crime are generally not admissible in his own favor: *Commonwealth v. Cooper*, 5 Allen, 495; 81 Am. Dec. 762; *State v. Hildreth*, 9 Ired. 440; 51 Am. Dec. 369. The declarations of an accused, made previous to and at the time of his arrest for larceny, are admissible to show his intent and repel the charge of felonious taking: *State v. Young*, 41 La. Ann. 94.

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## LASHER v. STATE.

[80 TEXAS APPEALS, 337.]

**RECORD-BOOKS INADMISSIBLE AS EVIDENCE OF CESSION TO UNITED STATES OF LANDS FOR FORTS, ETC.** — Where the statutes of a state provide that certified copies or certificates of archives of the state department shall be received in evidence in all cases in which the originals would be evidence, an original record-book of a county in which the cession of lands to the United States for a fort has also been recorded is not admissible in evidence to establish such cession.

**JURISDICTION OF STATE COURTS OVER CRIMES COMMITTED IN PLACES CEDED TO UNITED STATES.** — Where a state cedes to the United States lands for forts, etc., reserving concurrent jurisdiction to serve state processes, civil and criminal, in the ceded place, such reservation merely operates as a condition of the grant, and does not defeat the exclusive jurisdiction of the United States over such place, and the state courts have no jurisdiction of crimes committed therein.

**JUDICIAL NOTICE TAKEN OF CESSION OF PORTION OF TERRITORY OF STATE.** — The cession of a portion of the territory of a state to exclusive foreign jurisdiction and control is one of the highest acts of sovereignty, affecting the people of the state at large, and courts of the state will take judicial knowledge of the fact of cession, and that crimes committed within the ceded territory are beyond the jurisdiction of the state courts.

*Bethel Coopwood*, for the appellant.

*R. H. Harrison*, assistant attorney-general, for the state.

WHITE, P. J. Appellant was convicted of forgery. It is shown by the record that at the time of the alleged commission of the offense appellant was a soldier in the United States army, and the offense, if committed by him, was committed in Fort McIntosh, a military post occupied by the United States troops in the county of Webb, state of Texas.

On the trial, defendant offered evidence to establish the fact that the land upon which Fort McIntosh was situated had been legally ceded by the state of Texas to the United States government under the provisions of title 15, chapter 1, and especially articles 333 and 334, of our Revised Statutes, which authorize the governor of the state, whenever the United States shall acquire any land in this state, in the name and behalf of the state to cede to the United States exclusive jurisdiction over lands so acquired, the state retaining concurrent jurisdiction only so far as that all process, civil or criminal, issued under the authority of the state, or of any of the courts or judicial officers thereof, may be executed by the proper officers of the state on any person amenable to the same within the limits of the land so ceded, in like manner and with like effect as if no cession had taken place.

In order to establish the cession of the lands to the United States government by the governor of the state of Texas, the defendant offered in evidence the original record-book of Webb County containing the recorded deed. This evidence was objected to because it was incompetent, and the objection was sustained by the court, and the record-book as evidence was excluded. In this the court did not err.

The record-books of the county clerk's office of recorded deeds, etc., cannot be introduced in evidence to prove title, at least not without notice to the adverse party. "The law makes no provision for the original books of record of another court being read in evidence, but provides for certified copies": *Styles v. Gray*, 10 Tex. 503. Under our statute laws, the secretary of state is made the custodian of the archives of the state department, and he is required to give copies of records to any person applying for same, and it is expressly provided that such certified copies of certificates shall be received in

evidence in all cases in which the originals would be evidence: Rev. Stats., arts. 61, 2252, 2253, 2720, 2721.

By article 1, section 8, subdivision 18, of the constitution of the United States, Congress is given the power to exercise exclusive legislation and like authority over all places purchased by the consent of the legislature of the state in which the same shall be for the location of forts, magazines, arsenals, dock-yards, and other needful buildings. In *Commonwealth v. Clary*, 8 Mass. 72, it was held that "the courts of the commonwealth cannot take cognizance of offenses committed upon lands in the town of Springfield which have been purchased by the United States for the purpose of erecting arsenals, etc., to which the consent of the commonwealth was granted," etc., and that decision has subsequently been adopted and followed in the circuit court of the United States: *United States v. Cornell*, 2 Mason, 60. And in *United States v. Davis*, 5 Mason, 356, it was held that a reservation in a cession of "concurrent jurisdiction" to serve state processes, civil and criminal, in the ceded place, does not exclude the exclusive legislation or exclusive jurisdiction of the United States over the ceded place. It merely operates as a condition of the grant. Crimes committed in such localities are within the jurisdiction of the United States courts, and, under the express provisions of the United States statutes, are made liable to and receive the same punishment as the laws of the state in which such forts, dock-yards, navy-yards, arsenals, armories, or magazines, or other place ceded as aforesaid, is situated provide for in like offenses when committed within the boundary of any county of such state. In other words, the crimes are triable in the courts of the United States, but are punished as is provided by the state law.

But the question in the case before us is not limited as to whether the court ruled rightly with regard to the offered evidence under the facts stated. The further question is, whether or not the lower court and this court should not and will not take judicial cognizance of the fact that Fort McIntosh is a military post ceded to the United States government, and, as such, that crimes committed within said fort are beyond the jurisdiction of the courts of this state. If the lower court should have taken judicial knowledge of this fact, and if this court should now take judicial knowledge of said fact, then it follows that the lower court had no jurisdiction, and the prosecution should be dismissed.

Judicial knowledge is taken of such essential historic facts as have exercised controlling influence on the commonwealth. The same rule applies to any matters of public history affecting the whole public: 12 Am. & Eng. Ency. of Law, 174.

The fact of cession and segregation of a portion of the territory of a state to exclusive foreign jurisdiction and control is one of the highest acts of sovereignty, and one which affects the people of the state at large. The courts of New York have taken judicial knowledge of the historical fact that the western portion of its territory was by its own act ceded to Massachusetts: *People v. Snyder*, 41 N. Y. 397.

In *Wills v. State*, 3 Heisk. 141, it was held that "the court will take judicial notice that during the temporary occupancy of the adjacent grounds used by the United States forces while preparing cemetery-grounds, the jurisdiction was exclusive in the United States, so that the state could not punish a misdemeanor committed therein during such occupancy"; and in Alabama it is held that it is customary for the courts to take judicial knowledge of what ought to be known within the limits of their jurisdiction: *Gordon v. Tweedy*, 74 Ala. 232; 49 Am. Rep. 813.

The courts in Texas have taken judicial notice of the existence and conditions of the several colonial land contracts made with individuals: *Hatch v. Dunn*, 11 Tex. 708; *Robertson v. Teal*, 9 Tex. 344; *Wheeler v. Moody*, 9 Tex. 372; *Williamson v. Simpson*, 16 Tex. 433; *Chadoin v. Magee*, 20 Tex. 476; and this court has held that it takes judicial knowledge of the fact that the Indian Territory is beyond the jurisdiction of the state of Texas: *Conner v. State*, 23 Tex. App. 378. In *Boston v. State*, 5 Tex. App. 383, 32 Am. Rep. 575, it is held that courts take judicial cognizance of the territorial extent of the sovereignty and jurisdiction exercised by their own government; citing 1 Greenl. Ev., sec. 6.

It is unnecessary to discuss other questions presented on this appeal, because, in our opinion (for the reasons above stated), the district court of Webb County had no jurisdiction to hear and determine an offense committed within a fort belonging to the exclusive jurisdiction of the United States, and therefore the judgment is reversed and the prosecution dismissed.

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ADMISSIBILITY OF CERTIFIED COPIES IN EVIDENCE. — The general rule as to the use of writings as evidence is, that the originals must be produced, or the party relying upon them must satisfactorily account for their non-production.

The cases in which secondary evidence is thus admissible are discussed in the notes to *Georgia Pacific R'y Co. v. Strickland*, 12 Am. St. Rep. 285; *Wissman v. North Pacific R. R. Co.*, 23 Am. St. Rep. 140; *Boach v. Privett*, 24 Am. St. Rep. 822. As respects papers of a private nature, this rule is not changed by the statutes providing for the admission of certified copies in evidence, for such copies cannot be admitted, unless the originals have been lost or are not under the control of the parties offering the copies: *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103; *Barton v. Murrain*, 27 Mo. 235; 72 Am. Dec. 259; and authorities cited in the notes above referred to. In the case of certain public records, however, the rule has been relaxed on account of the inconvenience, and often the impossibility, of producing the originals, and statutes, of which the one mentioned in the opinion of the court is a type, have provided that in these instances certified copies shall be received in evidence in all cases in which the original would be evidence. See *Hammat v. Emerson*, 27 Me. 308, 46 Am. Dec. 598, for a case in which proof of papers belonging to the archives of the state was made by a duly authenticated copy. The provisions of these statutes being peremptory, it follows no other copy, not even that in the original record-book, when the nature of the transaction leads to its being so registered, can be substituted for the one prescribed by the legislature.

JUDICIAL NOTICE OF HISTORICAL FACTS: See *Conger v. Weaver*, 6 Cal. 548; 65 Am. Dec. 528; *Lanfair v. Mestier*, 18 La. Ann. 497; 89 Am. Dec. 658; *Swinnerton v. Columbian I. Co.*, 37 N. Y. 174; 93 Am. Dec. 500.

## HOOPER v. STATE.

[30 TEXAS APPEALS, 412.]

**FORMER ACQUITTAL, PLEA OF, PROOF NECESSARY TO ESTABLISH.** — In order to establish and make good a plea of former acquittal, the defendant must show that he has been acquitted of the accusation against him in the case on trial, not of an entirely different offense growing out of the same transaction.

**FORGERY — FORMER ACQUITTAL OF, NO BAR TO PROSECUTION FOR UTTERING INSTRUMENT FORGED.** — The forgery of an instrument and the passing of a forged instrument are two separate and distinct offenses under the code of Texas, and under an indictment for forgery a party cannot be convicted and punished for passing a forged instrument, and *vice versa*. The rule, therefore, that a party can be prosecuted but once for the same transaction, or for offenses growing out of the same transaction, does not obtain in cases of forgery and the passing of forged instruments, because they are not one and the same transaction, and an acquittal of a charge of forgery is no bar to a prosecution for the uttering and passing of the instrument forged.

**FILLING IN INSTRUMENT OVER GENUINE SIGNATURE FORGERY WHEN.** — Under the Texas statute, it is forgery to make, with intent to defraud or injure, a written instrument by filling in a blank instrument over a genuine signature.

**JUDGMENT NOT DISTURBED WHERE EVIDENCE CONFLICTING.** — Where the evidence as to the guilt or innocence of the accused is directly conflicting, the appellate court will not disturb the verdict and judgment.

**INDICTMENT** for uttering a forged instrument. The opinion states the case.

*Martin and Jones*, for the appellant.

*R. H. Harrison*, assistant attorney-general, for the state.

WHITE, P. J. The indictment in this case charged the appellant with uttering or passing a forged instrument, knowing it to be forged.

He pleaded specially a former acquittal, in bar of further prosecution in this cause, in that he had been previously indicted, tried, and acquitted under an indictment charging him with forgery of the same identical instrument which is the subject-matter of the prosecution in this case; and in support of his said plea, he set up as part thereof the indictment for forgery and the judgment of acquittal at his trial thereon. A demurrer and motion to set aside said special plea were interposed on behalf of the state, which motion was sustained, and the special plea of acquittal stricken out, and the action of the court in this matter is the first error complained of.

It is insisted the two offenses grew out of one and "the same transaction," and the state, having already prosecuted him as to the one, could not claim the right to further try and convict him for the other. By the provisions of the constitution, the acquittal of the defendant exempts him from the second trial or a second prosecution for the same offense: Code Crim. Proc., art. 21. No person for the same offense shall be twice put in jeopardy of life or limb: Bill of Rights, sec. 14; Code Crim. Proc., art. 9.

In order to establish and make good a plea of former acquittal, the defendant must show that he has been acquitted of the accusation against him in the case on trial, not of another or entirely different offense growing out of the same transaction. In *autrefois acquit* it is necessary that the prisoner could have been convicted on the first indictment of the offense charged in the second. The rule seems to be well settled, that a former trial (on a plea of former acquittal) is not a bar, unless the indictment was such that the prisoner might have been convicted upon proof of the facts set forth in the second indictment: *Simco v. State*, 9 Tex. App. 388. The proof must be made by showing the identity of the very acts or omissions which constitute the offense, — that the acts which constitute the offense for which the former acquittal was had are the

very acts which constitute the offense on trial: *Kain v. State*, 16 Tex. App. 282.

The forgery of an instrument and the passing of a forged instrument are two separate and distinct offenses as denounced by our code (Pen. Code, arts. 431, 443), and separate penalties are affixed to the commission of the two offenses: Pen. Code, arts. 442, 443. Under an indictment for forgery, a party cannot be convicted and punished for passing a forged instrument, and *vice versa*. Even if it be admitted that a party could be prosecuted but once for the same transaction, or for offenses growing out of the same transaction, that rule does not obtain in cases of forgery and the passing of forged instruments, because they are not one and the same transaction. The instrument must be forged before it can be uttered or passed. We are clearly of opinion that the court did not err in sustaining the state's demurrer to and striking out defendant's plea of former acquittal.

The facts in this case show that appellant was the confidential employee and assistant of one Atwood upon a ranch; that Atwood gave him a blank draft, already signed by him, with which appellant was to pay off a party who was to do certain work upon the ranch, to wit, plowing, or breaking up by plowing, a certain number of acres of land. When the plowing was done, appellant was to fill out the blank draft with the amount due for said work, draw the money from the bank, and pay it over to the party entitled to it. The plowing was never done by the party who was to be employed for that purpose, nor by any one else, and appellant filled in the blank for \$250, and made it payable to himself or order or bearer, and presented the same at the bank, and had it cashed and the money placed to his credit. These facts, unexplained, would make the act of defendant a forgery under our statute, which declares it is forgery to make, with intent to defraud or injure, a written instrument by filling in over a genuine signature, etc.: Pen. Code, art. 440; and it would clearly be an offense to pass as true such forged instrument in writing.

The defense was, that Atwood was indebted to defendant for work and labor done in and upon his ranch, and that appellant, having demanded a settlement with Atwood, had received from him the blank draft, in order that defendant might fill out the same with the amount which he claimed to be due him for his said services, and collect the same from the bank and pay himself. In order to meet and controvert this de-

fense, the prosecution showed by the testimony of Atwood the nature and character of defendant's employment by him; the fact that he had paid him off by drafts which had been cashed at the bank; and by defendant's receipts upon certain accounts which the defendant had presented, and which were allowed, for services rendered, and for moneys advanced by him for Atwood.

The main tenor of defendant's bills of exception complains of certain testimony admitted and rejected with regard to these collateral bills and receipts, and a certain written instrument of agreement for compromise between the parties with a view to a settlement between them. In the attitude in which these matters are presented, we do not believe the court erred in its rulings complained of. There was direct and positive contradiction between the testimony of Atwood on the one hand, and of the defendant, who testified in his own behalf, on the other, and these matters tend, so far as admitted, to elucidate and throw light upon the questions in dispute.

The court did not err in excluding the testimony of one of the defendant's expert witnesses with regard to an examination made by him with a microscope of a receipt given by the defendant, because the witness did not show himself to be an expert in microscopic investigations.

The court did not err in excluding a certain telegraphic dispatch, mentioned in defendant's bill of exceptions No. 2, as the same was irrelevant, immaterial, and did not tend to elucidate any matter in issue in the case.

We have given this case our most earnest consideration, and our conclusion is, that no reversible error has been committed upon the trial in the court below. As to the evidence, we have already stated that it was directly conflicting in so far as the two principal witnesses were concerned. If the testimony of Atwood, the state's witness, is to be believed, then the prosecution has unquestionably made out and fully sustained the crime as alleged in the indictment. To determine and settle this conflict was a matter peculiarly within the province of the jury, and they have determined it adversely to the appellant. The learned judge who tried the case below, and heard the witnesses testify upon the stand, refused to set aside the verdict and grant a new trial. He was in a much better condition or situation than this court is to judge as to the merits and conclusiveness of the testimony. Upon this attitude of the case as presented in the record, we do not feel that we



would be warranted in disturbing the verdict and judgment, and the judgment is therefore affirmed.

**FORMER ACQUITTAL — PLEA OF — PROOF TO ESTABLISH.** — To sustain a plea of *autrefois acquit*, a legal acquittal, by judgment upon trial, by a verdict of a petit jury, must be shown: *State v. Hornsby*, 3 Rob. (La.) 583; 41 Am. Dec. 314, and note. Former acquittal is not a bar to a subsequent prosecution, unless the accused could have been convicted upon the first indictment upon proof of the facts averred in the second: *Dominick v. State*, 40 Ala. 680; 91 Am. Dec. 496, and note. Former acquittal or conviction as a defense is discussed in notes to *People v. Bentley*, 11 Am. St. Rep. 228; *State v. Nash*, 41 Am. Rep. 475.

**FORGERY — USE OF GENUINE SIGNATURE — INTENT TO DEFRAUD.** — The offender may be guilty of the false making of an instrument though he signed his own name, if it is false and calculated to deceive one who gives credit to it as authentic: *Commonwealth v. Wilson*, 89 Ky. 157; 25 Am. St. Rep. 528, and note. When the procuring of a genuine signature is a false making, see extended note to *Arnold v. Cost*, 22 Am. Dec. 309, 310.

## JOHNSON v. STATE.

[30 TEXAS APPEALS, 419.]

**MURDER BY POISON — DECLARATIONS OF INJURED PERSON ADMISSIBLE AS RES GESTÆ WHEN.** — Where the indictment charges the defendant with intent to murder two persons by mingling poison in coffee, and the evidence shows that on the evening after the burial of one of the persons poisoned, the other one had a severe fit, and as soon as he was able to speak, said, "Go for the doctor, quick! I have taken another cup of that coffee, and it is about to kill me," these declarations are admissible in evidence as part of the *res gestæ*.

**VERDICT FOR MURDER WHICH DOES NOT FIND DEGREE, VOID.** — The following verdict in a trial for murder by poisoning: "We, the jury, find the defendant guilty, and assess his punishment at confinement in the penitentiary for life," — is fatally defective and void, because the jury fail to find, as they are required by the statute to do, whether the murder is of the first or second degree. The statute requiring the jury to find the degree of the murder is imperative, and the fact that the murder is committed by poisoning, which is *per se* murder in the first degree, does not affect the case.

**ACCUSED ENTITLED TO PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT.** — A defendant in a criminal case is entitled to the presumption of innocence and reasonable doubt, and a charge to the jury, which, in effect, requires them to believe from the evidence adduced that the defendant is innocent before they can acquit him, is erroneous.

**INDICTMENT for murder.** The opinion states the case.

No briefs on file for either party.

WHITE, P. J. This is the second appeal in this case. On the former appeal, which is reported in 29 Tex. App. 150 et seq., the judgment was reversed on account of the erroneous rejection of certain testimony and the defect in the fifth paragraph of the charge of the court.

Defendant's fourth bill of exceptions was reserved to the admission by the court, over the objection of the defendant, of the testimony of the witness Davis, to the effect that on the afternoon of the day on which Elizabeth Rucker was buried, and after she was buried, he (the witness) was at the house of H. P. Rucker, and looking through the window, saw that H. P. Rucker had fallen off of his bed with a hard fit; that he at once went in to pick him up, and placed him back on the bed; that as soon as Rucker could speak, he said: "Go for the doctor, quick! I have taken another cup of that coffee, and it is about to kill me." Defendant's objection to this testimony was, that it was hearsay and immaterial. We are of opinion, the state, having shown, prior to the death of Elizabeth Rucker, that H. P. Rucker had also had fits would perhaps be entitled to prove that he continued to have other like fits subsequent to the death of said Elizabeth Rucker.

The main objection is, that his declaration that he had taken "another cup of that coffee" was hearsay and inadmissible, the defendant not being present. The indictment alleged that strychnine or other poison had been mingled with water and coffee for the purpose of and with the intent to kill both H. P. Rucker and Elizabeth Rucker, and that the said parties had drank said water and coffee, and were so poisoned; and this allegation was proved. As stated above, it was legitimate to prove that H. P. Rucker continued to have fits after the death of Elizabeth Rucker. If this be so, then the rule is well settled. Mr. Greenleaf says: "Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence": 1 Greenl. Ev., sec. 102.

In the well-considered case of *Travelers Ins. Co. v. Mosley*, 8 Wall. 397, and which is now the leading case upon this subject, the supreme court of the United States held that "the declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and declamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness or from injury by

accident or violence. . . . Where the principal fact is the fact of bodily injury, the *res gestæ* are the statements of the cause made by the injured party almost contemporaneously with the occurrence of the injury, and those relating to the consequences, made while the latter subsisted and were in progress"; citing *Bacon v. Inhabitants*, 7 Cush. 586; *Thompson v. Trevanion*, Skin. 402; *Aveson v. Kinnaird*, 6 East, 197; *King v. Foster*, 6 Car. & P. 325; *Commonwealth v. McPike*, 3 Cush. 181; 50 Am. Dec. 727; *Beaver v. Taylor*, 1 Wall. 637; *Cox v. State*, 8 Tex. App. 254; 34 Am. Rep. 746. The witness's declaration as to the cause of his bodily suffering was competent and admissible.

There is a bill of exceptions in the record reserved in the court below to the sufficiency of the verdict of the jury. The verdict is in these words, to wit: "We, the jury, find the defendant guilty, and assess his punishment at confinement in the penitentiary for life. C. F. Sanders, foreman." Appellant was charged in the indictment with murder by poisoning, and we presume it was the intention of the jury to find him guilty of murder in the first degree, from the penalty assessed, and because the murder was committed by poisoning. Murder committed by poisoning is *per se* murder in the first degree: Pen. Code, art. 606.

But our statute requires in all cases of murder, whether committed by poisoning, or through violence applied directly to the person, that "if the jury shall find any person guilty of murder, they shall also find . . . whether it is of the first or second degree; and if any person shall plead guilty to an indictment for murder, a jury shall be summoned to determine what degree of murder he is guilty of; and in either case they shall also find the punishment": Pen. Code, art. 607. This statute is imperative, and a verdict for murder which does not find the degree is absolutely void: Willson's Crim. Stats., sec. 1051.

In *Zwicker v. State*, 27 Tex. App. 589, it is held: "The statute expressly requires that in convictions for murder the verdict shall specify the degree of murder of which the defendant is guilty. The failure of the verdict to so specify the degree is cause for reversal."

An exception was also taken to the fourth paragraph of the court's charge, as follows: "If, on the contrary, you believe from the evidence that the defendant, acting either alone or in concert with Jeff Wood, did not mingle and cause to be

mingled certain poison called 'strychnine,' or other poison, with water and coffee, with the intent to injure and kill H. P. Rucker and Elizabeth Rucker, and did not poison and kill Elizabeth Rucker, then you will find the defendant not guilty." This is substantially the same character of charge as given in the fifth paragraph of the charge of the court on the former appeal, and for the reasons in the opinion on the former appeal, which held said fifth paragraph illegal, we think this fourth paragraph, above quoted, is also illegal: *Johnson v. State*, 29 Tex. App. 151; *Moore v. State*, 28 Tex. App. 377.

Because the verdict of the jury is wholly insufficient, and because of the error in the fourth paragraph of the court's charge to the jury, the judgment is reversed and the cause remanded.

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**EVIDENCE—DECLARATIONS OF INJURED PERSONS ADMISSIBLE AS PART OF RES GESTÆ WHEN.**—The declarations of a negro woman, made about half an hour after she was injured, showing when, how, and by whom she was injured, are admissible as part of the *res gestæ* after her death, on the trial of the person accused of killing her: *Lewis v. State*, 29 Tex. App. 201; 25 Am. St. Rep. 720, and note; note to *Rhodes v. State*, 25 Am. St. Rep. 436; to the same effect, see *Kirby v. Commonwealth*, 77 Va. 681; 46 Am. Rep. 747, and note; *Monday v. State*, 32 Ga. 672; 79 Am. Dec. 314, and note; extended note to *State v. Molisee*, 58 Am. Rep. 184.

**HOMICIDE—VERDICT FOR MURDER MUST SPECIFY DEGREE.**—Where the statute divides murder into two degrees, and provides that the jury must specify the degree, a verdict of guilty of murder, without specifying the degree, is bad, and no judgment can be rendered on it: *State v. Rover*, 10 Nev. 388; 21 Am. Rep. 745; *Hogan v. State*, 30 Wis. 428; 11 Am. Rep. 575. The jury before whom any person indicted for murder shall be tried, if they find such person guilty thereof, shall designate by their verdict whether it be murder of the first or second degree: *State v. Lindsey*, 19 Nev. 47; 3 Am. St. Rep. 776.

**CRIMINAL LAW.—ACCUSED ENTITLED TO PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT:** See note to *Rhodes v. State*, 25 Am. St. Rep. 436. The guilt of an accused must be proved beyond a reasonable doubt: *Bennett v. State*, 86 Ga. 401; 22 Am. St. Rep. 465, and note; *State v. Hossie*, 15 R. I. 1; 2 Am. St. Rep. 838, and note; *Mitchell v. State*, 22 Ga. 211; 68 Am. Dec. 493, and note. An instruction that "defendant is presumed to be innocent until his guilt is established by the evidence, to the satisfaction of the jury, beyond a reasonable doubt," is a substantial compliance with the statute: *McDade v. State*, 27 Tex. App. 641; 11 Am. St. Rep. 216. The rule that in criminal cases the defendant is entitled to the benefit of a reasonable doubt, applies not only to the case as made by the prosecution, but also as to any defense offered: *People v. Downs*, 123 N. Y. 558. On a trial for murder, an instruction "that the absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence," asked for by the defense, should have been given: *Vaughan v. Commonwealth*, 85 Va. 671.

## McLAIN v. STATE.

[30 TEXAS APPEALS, 482.]

**BURGLARY — FOOT-TRACKS, TESTIMONY AS TO, ADMISSIBLE.** — On a trial for burglary, a witness may testify that he measured the foot-tracks found at the place where the burglary was committed; that he also examined the shoe that defendant had on just after the burglary; and that upon placing the shoe in the track, he found that it fitted exactly. Such testimony is not inadmissible as calling for the opinion of the witness.

**CHARGE OF COURT TO JURY MUST BE CERTIFIED AND FILED.** — A charge of the court to the jury, which is neither signed by the judge nor in any manner certified by him, cannot be considered by the appellate court for any purpose, since the statute requires that such charge shall be certified by the judge, filed among the papers in the cause, and constitute a part of the record.

**INDICTMENT** for burglary. The opinion states the case.

*Smith and Wear*, for the appellant.

No brief on file for the state.

DAVIDSON, J. Over defendant's objection, the state was permitted to prove by the witness Long that he measured tracks found at the place of burglary; that he also examined the shoe defendant had on just after the commission of the offense; and that upon placing the shoe in the track, he found that it fitted exactly. The defendant objected to this evidence, because it called for and elicited the opinion of the witness, and was therefore inadmissible.

It was not error to permit this witness to state his opinion as to the comparison of the tracks and the shoe, and their correspondence with each other, nor was it error to permit the witness to state the result of his comparison of the shoe and the track after placing the shoe in the track. The admissibility of such testimony is not an open question in this state: *Kemp v. State*, 28 Tex. App. 519; *Clark v. State*, 28 Tex. App. 189; 19 Am. St. Rep. 817; *Thompson v. State*, 19 Tex. App. 594.

There is in the record what purports to be a charge of the court, but it is neither signed by the judge nor in any manner certified by him. We are not authorized to consider it for any purpose. Our statute requires that "the general charge given by the court, as well as those given and refused at the request of either party, shall be certified by the judge and filed among the papers in the cause, and shall constitute a part of the record of the cause": Code Crim. Proc., art. 680; *Williams v. State*, 18 Tex. App. 409; *Smith v. State*, 1 Tex.

App. 408; *Lindsay v. State*, 1 Tex. App. 584; *West v. State*, 2 Tex. App. 209; *Hubbard v. State*, 2 Tex. App. 506; *Henderson v. State*, 5 Tex. App. 184. This omission was called to the court's attention in the motion for a new trial, but he promptly overruled the motion. We see no reason for such errors. The court should bow in submission to the express statutory will of the law-making power.

For this error of the court, the judgment will be reversed and the cause remanded.

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CRIMINAL LAW — EVIDENCE — FOOT-PRINTS. — On a trial for murder, the prosecution was allowed to prove that the committing magistrate had compelled the prisoner to make his foot-prints in an ash-heap, and that they corresponded with foot-prints found at the scene of the crime, and it was held not error: *Walker v. State*, 7 Tex. App. 245; 32 Am. Rep. 595, and note. The defendant's counsel, in the course of his argument in a trial for felony, said that the jury might try for themselves whether such boots as the witnesses for the prosecution described would make such tracks as they described. Some of the jury, without leave of the court, tried the experiment, and a verdict of conviction was set aside therefor: *State v. Sanders*, 68 Mo. 202; 30 Am. Rep. 782; see *State v. Graham*, 74 N. C. 646; 21 Am. Rep. 493.

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## LOPEZ v. STATE.

[30 TEXAS APPEALS, 487.]

INSANE WITNESS INCOMPETENT TO TESTIFY IN CRIMINAL CASE. — On a trial for rape, a prosecuting witness, who was insane at the time of the commission of the offense, and is insane at the time of the trial, cannot be permitted to testify over the objection of the defendant, under the provisions of the Texas Code of Criminal Procedure.

INDICTMENT for rape. The opinion states the case.

No brief on file for appellant.

*R. H. Harrison*, assistant attorney-general, for the state.

WHITE, P. J. Appellant was convicted of rape.

There is but one single question to be determined, in order to dispose of this appeal. The conviction rests mainly, as to the *corpus delicti*, upon the testimony of the prosecutrix. She was a negro woman; the defendant was a Mexican. She was crazy, and the Mexican had lost some fingers off of his hand.

This prosecution, however, was not based upon the latter clause of article 528 of our Penal Code, which makes it rape *per se* to have carnal knowledge of a woman being so mentally diseased at the time as to have no will to oppose the carnal

act, the person having carnal knowledge of her knowing her to be so mentally diseased: Willson's Crim. Stats., sec. 905.

When the prosecutrix was called to the stand, defendant's counsel requested and was accorded permission of the court to test her competency as a witness upon her *voir dire*, the objection to her competency being that she was insane at the time the offense occurred about which she was called to testify, and that she was still insane at the time she was proposed as a witness; that she did not possess sufficient intellect to relate transactions; and that she did not understand the nature or obligations of an oath. The court directed the examination to be had with regard to her competency, which resulted in the following questions and answers, as shown by the bill of exceptions:—

"Q. What is your name? A. They put Mary Simmons to me this year.

"Q. What did they put to you last year? A. They put Mary Kirks to me.

"Q. What did they put to you the year before that? A. They put me in the prison.

"Q. Do you know what that gentleman there, the clerk, did when you and he held up your hands? A. No, sir.

"Q. Do you know what he said to you? A. No, sir.

"Q. Do you know what it is to be sworn in court? A. It is to speak against the truth.

"Q. If you were to swear falsely against this man and die, what would become of you? A. I would go to heaven and sing praises forevermore.

"Q. If you were to swear falsely against this man, what would be done with you here on earth? A. I guess I would be prosecuted or put under bond.

"Q. If you were to swear falsely here in court, do you think you would be punished? A. I don't know. I don't think I ought to be punished, because I have been punished enough already.

"Q. Do you know what you came here for? A. I guess I came here to read the fourth chapter of Proverbs.

"Q. Do you know on what day Christmas comes? A. No.

"Q. Do you know what day of the month the Fourth of July comes on? A. No.

"Q. Do you know what day of the week Good Friday comes on? No, sir.

"Q. Do you know what day of the week Easter Sunday comes on? A. No, sir.

"Q. What year were you born? A. In the year thirty-three.

"Q. Where were you born? A. In Texas.

"Q. In what part of Texas? A. In Texas.

"Q. Where is that? A. In Georgia.

"Q. Have you a husband? A. I used to have.

"Q. He was a lawyer, wasn't he? A. Yes, sir.

"Q. And a doctor, too, wasn't he? A. Yes.

"Q. And wasn't he a preacher, too? A. Yes, but that wasn't part of his constitution.

"Q. How many children have you? A. Seven, I believe.

"Q. They are all the same size, are they not? A. Yes.

"Q. Where are they now? A. Some of them are in Texas and some over in the Red Sea.

"Q. What church do you belong to? A. The Catholic Baptist.

"Q. Have not you some fine farms? A. I did have, but dropped them all into my shipmate.

"Q. Who is your shipmate? A. Mr. Caldwell.

"Q. Where do you and your shipmate go? A. Down on the bay.

"Q. Where is the bay? A. Over in Georgia, by the Red Sea.

"Q. You travel a great deal, do you not? A. Yes.

"Q. How long do you stay? A. One, two, or three days.

"Q. Where do you go? A. Up to Georgia.

"Q. Do you go to Europe, too? A. Yes, sir.

"Q. Don't you go to Asia, too? A. Yes.

"Q. Don't you go to Africa, too? A. Yes.

"Q. How do you come back? A. With my shipmate, on the bay."

The defendant's counsel here informed the court that he did not care to further examine the witness on her *voir dire* as to her competency, but would introduce other testimony on that point. Whereupon the court suggested that he would like to hear the witness questioned as to the case about which she was called to testify before passing upon her competency as a witness, and directed the district attorney, representing the state, to proceed and examine her as to the facts and circumstances of the case about which she was called to testify as a witness, stating to the counsel for the defendant that he



would reserve his decision as to the competency of the witness until she had been so examined by the district attorney, and until the defendant should have introduced such other witnesses as he might choose to establish her incompetency.

Thereupon the district attorney proceeded to examine the witness, the said Mary Simmons, she being the person alleged to have been raped by defendant, said examination proceeding as follows: The district attorney, pointing to the defendant, asked the witness:—

“Q. Do you know this man? A. No, sir.

“Q. Did you ever see him before? A. No, sir.

“Q. Mary, this man is here charged with raping you. Now, tell us, did he ever do anything wrong to you? Didn't you have cockle-burrs in your hair and dress, and dirt on your neck? A. Oh, yes, sir.

“Q. Now, Mary, go on and tell us all about it. A. Well, he came up to Nelson Harper's house, where I was, and was fooling with me in the house, and I went out from the house and started off from him, and he came out behind me, and went around and met me, and he came up to me and caught hold of me, and tried to get me down, but I wouldn't do it; and we fought and tussled around there until we fell. But I was as strong as he was, and fell, not right on top, but more on top than he did, but he turned me over, and got up my clothes, and 'rutted' me. I got up, and pulled up his shirt-tail, and took a stick, and whipped him good. I did n't want him to do what he did. I did n't consent to it. I hallooed while he was doing me that way.

“Q. Now, Mary, who was it that did you that way? Was it this defendant here? [pointing to him]. A. Let me see his hand. [Defendant held up his hand, and she proceeded.] Yes, he is the man. I know he is the man who 'rutted' me. I know him by his hand having some fingers off. I know his clothes, too.

“Q. Well, what did you do then, Mary? A. I went right straight and told Lou Harper and Lawyer Burditt about it.”

The district attorney here announced that he was through with the witness, and upon cross-examination by defendant's counsel, she testified as follows:—

“I was n't glad of it. I wish he had n't. He just caught hold of me, and we tussled around. Yes, I did give him a good whipping with a stick as soon as I got up. No, there wasn't about ten people passed while he had me down;

there was n't but about one, two, or three. As soon as I got up I went down to 'pulk'; that is, down on the bay, over in Georgia. It was a Mexican who did me that way. I know every Mexican in this country. There is about sixty million of them. The white folks are all turning to Mexicans. I have talked to a billion people about this case. I came here from the Red Sea."

We think that this examination clearly shows that the prosecutrix was insane at the time said examination was had. In addition thereto, several witnesses were introduced who were well acquainted with her, who testified that she was insane, and had been insane for several years, and such was shown to be her reputation throughout the community in which she lived. It was also shown that, previous to the occurrence complained of, she had been confined in a lunatic asylum as an insane person.

Dr. Clark, a medical expert, who had heard the testimony of the prosecutrix and the other witnesses who testified on the subject, declared that, in his opinion, the prosecutrix was insane; that her insanity was of a permanent character; that he did not believe that she had any lucid intervals; that she was not only insane now (at the time of the trial), but that she was insane at the time of the alleged rape; that she is not competent and able to understand the nature and obligation of an oath, and does not know right from wrong. Dr. Miller, another medical expert, fully sustained the testimony of Dr. Clark.

Notwithstanding this testimony as to her sanity, or rather insanity, the court overruled the objection of defendant, and permitted the prosecutrix to testify; and as heretofore stated, it was by her testimony alone that the *corpus delicti* was proved.

In his work on criminal evidence, Mr. Wharton says: "Insanity, unless amounting to entire extinction of reason, is not considered ground for absolute exclusion from the witness-box. It is, however, admissible, in order to affect his credit, to prove that witness was subject to insane delusions. If insanity or other mental incompetency be set up as a ground for exclusion, the preliminary examination of the witness is the peculiar province of the court. If the witness, in the opinion of the court, is absolutely incompetent, he should be ruled out. But to justify such exclusion, mere streaks of insanity are not sufficient. A man may have many delusions, and yet be ca-

pable of narrating facts truly; and in any view, the existence of such delusions on his part at the time of trial goes to his credit, and not to his competency. Evidence of mental disturbance at the time of the event narrated can be received to affect credibility. An inquisition of lunacy may be *prima facie* evidence of incompetency, but does not exclude, if, upon hearing, the court find that the witness understands the nature of an oath and the facts of which he speaks. When there is no inquisition, the burden is on the party disputing sanity. We have already noticed that where it appears that a witness was absolutely deficient of the requisite perceptive powers at the time of the event to be testified to, he may be excluded by the court. Instances of this kind, however, are of very rare occurrence": Wharton's Crim. Ev., 8th ed., secs. 370-378.

Mr. Greenleaf, speaking of mental deficiency with regard to an understanding of the nature and obligations of an oath, says: "It makes no difference from what cause this defect of understanding may have arisen, nor whether it be temporary and curable, or permanent, whether the party be hopelessly an idiot or maniac, or only occasionally insane, as a lunatic. . . . While the deficiency of understanding exists, be the cause of what nature soever, a person is not capable to be sworn as a witness": 1 Greenl. Ev., 13th ed., sec. 365. In a note to this same section, he says: "Where, in a trial for manslaughter, a lunatic was admitted as a witness, who had been confined in a lunatic asylum, and who labored under the delusion, both at the time of the transaction and of the trial, that he was possessed of twenty thousand spirits, but whom the medical witness believed to be capable of giving an account of any transaction that happened before his eyes, and who appeared to understand the obligations of an oath, and to believe in future rewards and punishments, it was held that his testimony was properly received." And he further says, citing from *Coleman v. Commonwealth*, 25 Gratt. 865, 18 Am. Rep. 711: "If the witness can discern right from wrong, and has power to speak from memory, he is competent."

In the case before us, the examination shows that the prosecutrix, though insane, had some idea that she would be punished if she swore falsely against the defendant in court. It is also evident from her testimony, with regard to the matters transpiring at the time of the alleged rape, that her recital of the facts attendant upon it is given in a clear and

unambiguous manner, and with a particularity of detail most strongly impressing the mind with the probability and truth of the facts she relates. More than this, the evidence of the other witnesses, to whom she related the matter immediately after it transpired, as to the statements made to them by the prosecutrix, and the physical facts which they found upon the ground at the place to which she took them and pointed out as the place where the rape occurred, all go to show a strong corroboration of her testimony in its material parts.

Again, she made complaint to these parties, they being the first persons she met with after the transaction. Her personal appearance and the torn condition of her clothes, as well as the physical indications upon the ground, together with the fact that she was personally examined by two women, at the instance of Mr. Eastwood, immediately after her relation of the transaction, and found by them to be in a condition showing that she had recently copulated with a man, all tend to show most conclusively, and almost beyond a doubt, that she had indeed been ravished, as she stated that she had; and if, under our law, she could be held a competent witness under any circumstances, we would feel warranted in concluding from the record, as it is shown to us, that the defendant's guilt was fully established by the evidence.

But, under our statute declaring the persons incompetent to testify, it is expressly provided that "insane persons who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify, as well as other persons who, after being examined by the court, appear not to possess sufficient intellect to relate transactions with respect to which they are interrogated, or who do not understand the obligations of an oath," are absolutely incompetent to testify: Code Crim. Proc., art. 730, subds. 1, 2.

Under the plain, unambiguous, and imperative language of our statute, we are compelled to hold that "insane persons who are in an insane condition of mind at the time when they are offered as witnesses, or who were in that condition when the events happened of which they are called to testify," are totally incompetent and inadmissible as witnesses. There is no exception to this statutory rule.

Such being the case, we are constrained to further hold that the court erred in permitting the prosecuting witness, Mary

Simmons, to testify in this case, and for this error the judgment is reversed and the cause remanded.

**ADMISSIBILITY OF EVIDENCE OF INSANE WITNESS.** — At common law, it was formerly held that insane persons, or lunatics, as they were called, could not be admitted to testify as witnesses. Insanity was, in olden times, but little understood; the lunatic was generally classed with the idiot, and both were absolutely excluded from the witness-box. The advancement of science and the improvement of society have, in modern times, very materially mitigated the misfortunes of the insane, and greatly modified the sweeping rule that formerly excluded them from testifying as witnesses in courts of justice. And while a person who is, at the time of his examination, found to be so much under the influence of insanity as to be deprived of that share of understanding which is necessary to give him a knowledge of right and wrong, and to enable him to retain in memory the events of which he has been witness, ought to be excluded from testifying as a witness, the rule now firmly established, both in England and in this country, is, that a lunatic or insane person is admissible as a witness, if, on examination by the court or by evidence *aliunde*, he appears to have sufficient understanding to apprehend the nature and obligation of an oath, and to be capable of giving a correct account of the matters that he has seen or heard, and in reference to which he is called to testify: 1 Wharton on Evidence, 3d ed., sec. 403; Best on Evidence, Chamberlayne's Am. ed., sec. 150; 11 Am. & Eng. Ency. of Law, 144; *Regina v. Hill*, 2 Den. C. C. 254; 5 Cox C. C. 259; 5 Eng. L. & Eq. 547; *Fennell v. Tait*, 1 Cromp. M. & R. 584; *Spittle v. Walton*, L. R. 11 Eq. Cas. 420; *Evans v. Hellich*, 7 Wheat. 453; *District of Columbia v. Armes*, 107 U. S. 519; *Campbell v. State*, 23 Ala. 44; *Worthington v. Mencer*, Sup. Ct. Ala., May, 1892; *Holcomb v. Holcomb*, 28 Conn. 177; *Mayor etc. of Gainesville v. Caldwell*, 81 Ga. 76; *Kendall v. May*, 10 Allen, 59; *Cannady v. Lynch*, 27 Minn. 435; *Livingston v. Kiersted*, 10 Johns. 362; *Hartford v. Palmer*, 16 Johns. 143; *Coleman v. Commonwealth*, 25 Gratt. 865; 18 Am. Rep. 711. Mr. Justice Field, in delivering the opinion of the court in *District of Columbia v. Armes*, 107 U. S. 521, said: "It is undoubtedly true that a lunatic or insane person may, from the condition of his mind, not be a competent witness. His incompetency on that ground, like incompetency for any other cause, must be passed upon by the court, and to aid its judgment, evidence of his condition is admissible. But lunacy or insanity assumes so many forms, and is so often partial in its extent, being frequently confined to particular subjects, whilst there is full intelligence on others, that the power of the court is to be exercised with the greatest caution. The books are full of cases where persons showing mental derangement on some subjects evince a high degree of intelligence and wisdom on others. The existence of partial insanity does not unfit individuals so affected for the transaction of business on all subjects, nor from giving a perfectly accurate and lucid statement of what they have seen or heard. . . . The general rule, therefore, is, that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself and any competent witnesses who can speak to the nature and extent of his insanity."

**INQUISITION OF LUNACY PRIMA FACIE EVIDENCE OF INCOMPETENCY.** — An inquisition of lunacy found against a party offered as a witness is *prima facie* evidence of his incompetency to testify as a witness: *Hoyt v. Adee*, 3 Lana. 173. And general insanity being proved, the presumption is, that it continues, and it rests upon the party offering the witness to show that he has been so far restored to sanity that he may be heard as a witness with any reliance upon his memory and judgment. Where this is not done, the witness is not competent: *Armstrong v. Timmons*, 3 Harr. (Del.) 342. Before, therefore, the affidavit of a person suffering from mental delusions and confined in a lunatic asylum can be read, his mental condition must be first ascertained by preliminary inquiry before a court, or some person specially delegated for that purpose. And an affidavit sworn to by a person under confinement in a lunatic asylum, without any notice in the jurat of the circumstances under which or the place where it was sworn, will be ordered taken off the file: *Spittle v. Walton*, L. R. 11 Eq. Cas. 420. But an inquisition of lunacy found will not exclude the witness, if upon a hearing the court finds that he understands the nature of an oath and the facts about which he is called to testify: 1 Wharton on Evidence, 3d ed., sec. 403; *Regina v. Hill*, 2 Den. C. C. 254; 5 Cox C. C. 259; 5 Eng. L. & Eq. 547; *Kendall v. May*, 10 Allen, 59; *Cannady v. Lynch*, 27 Minn. 435. And a person who has, some time prior to the trial at which he is called upon to testify, been declared insane and placed under guardianship, and thereafter, before being introduced as a witness, has been duly adjudged sane and released from guardianship, is a competent witness in the case, and may testify as to facts which occurred during the period he was under guardianship. It is for the jury to judge of the credit that is to be given to his testimony: *Sarbach v. Jones*, 20 Kan. 497.

**COMPETENCY OF INSANE WITNESS, HOW AND WHEN DETERMINED.** — The question of the competency of an insane witness called to testify in a case should be determined by the court by a preliminary examination before the witness is sworn. In conducting this preliminary investigation, the witness himself may be examined and cross-examined, and other witnesses may be called to testify as to the nature of his insanity, in order that the court may be enabled to determine the question of his competency: 11 Am. & Eng. Ency. of Law, 145; *Regina v. Hill*, 2 Den. C. C. 254; 5 Cox C. C. 259; 5 Eng. L. & Eq. 547; *Holcomb v. Holcomb*, 28 Conn. 177; *Coleman v. Commonwealth*, 25 Gratt. 865; 18 Am. Rep. 711. But see *Robinson v. Dana*, 16 Vt. 474, in which it was held that to exclude a witness from testifying, as being *non compos mentis* or an idiot, the fact must be proved by other testimony and not by a preliminary examination of the witness. This decision is not in harmony with the current of authority, and seems to be unsound in principle.

**EVIDENCE OF INSANITY AFFECTING CREDIBILITY OF WITNESS.** — A witness may be discredited by showing that he is governed by insane delusions on the subject of his testimony, but no matter how strong his delusions may be, they will not exclude him from being a witness during a lucid interval in which he is free from them: 1 Wharton on Evidence, 3d ed., sec. 402; *Campbell v. State*, 23 Ala. 44; *Evans v. Hettich*, 7 Wheat. 453; *State v. Kelley*, 57 N. H. 549. The question whether a witness, sane when he testifies, was insane at the time of the transactions with regard to which he testifies, goes to the credibility of his testimony, and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the opposing party with his other evidence: *Holcomb v. Holcomb*, 28 Conn. 177. And it seems that although no objection is made to the competency of a witness on the ground

that he is insane, yet evidence of the fact that he is insane may be admitted to affect the credit to be given to his testimony: *Rivers v. Giso*, 3 E. D. Smith, 264. But when the competency of a witness is attacked on the ground of his insanity, and the court decides in favor of his sanity, the evidence adduced to the court on that point cannot be submitted to the jury to affect his credibility: *Campbell v. State*, 23 Ala. 44. In *Beß v. Rianer*, 16 Ohio St. 45, it was held not to be admissible, for the purpose of impeaching the credibility of a competent witness, to prove by other witnesses that such witness is not possessed of ordinary intelligence.

## CARTER v. STATE.

[30 TEXAS APPEALS, 561.]

**MANSLAUGHTER, LAW OF, OMISSION TO CHARGE, ERROR, WHEN.** — Where, on a trial for murder, the evidence shows that the defendant, at the time of the homicide, was engaged with a constable as one of his posse, in attempting to illegally, and without a warrant, arrest the deceased, who was killed by the posse, through mistake, for another party, whom they had intended to arrest, it is error for the court to omit to charge the jury upon the law of manslaughter, since a homicide committed by the defendant, under such circumstances, while intending only to make an illegal arrest, might be of no higher grade than manslaughter.

**ALL LAW APPLICABLE TO EVIDENCE ADDUCED IN DEFENSE SHOULD BE SET FORTH IN CHARGE TO JURY.** — Since the jury ought, in the trial of one charged with murder, as far as possible, to judge of the facts surrounding the homicide from the stand-point of the defendant, the charge of the court should submit to them all the law legitimately and fairly arising upon the evidence which he has adduced in his defense, whether the court believes it to be true or false.

**NO FELONY WITHOUT FELONIOUS INTENT.** — There can be no felony without a felonious intent, the act done characterizing the intent, and not the intent the act. If the intent of a defendant is only to make an illegal arrest, and in attempting to make it he is forced to take the life of the person whom he is trying to arrest, the offense which he was about to commit, being only a misdemeanor under the law of Texas, will be considered in determining the degree of his crime in committing the homicide, and the homicide will be manslaughter, and not murder.

**HOMICIDE BY ONE HAVING PERFECT RIGHT OF SELF-DEFENSE JUSTIFIABLE.** — Where a person, being himself without fault, reasonably apprehends death or serious bodily harm to himself unless he kills his assailant, the killing is justifiable. But a person cannot avail himself of a necessity which he has knowingly and willingly brought upon himself.

**HOMICIDE COMMITTED IN ATTEMPTING ILLEGAL ARREST NOT LESS THAN MANSLAUGHTER WHEN.** — Where the defenses are mistaken identity and self-defense, a homicide committed in illegally attempting to arrest the deceased cannot be of a less grade than manslaughter, though committed upon reasonable apprehension of danger.

**RETREAT, LAW OF, NOT APPLICABLE TO CASES OF IMPERFECT SELF-DEFENSE.** — Whenever the question of justifiable homicide is raised by the evidence, the court should fully instruct the jury in regard to the law of self-de-

fense and retreat as enunciated in the Penal Code; but the doctrine of retreat is not applicable to cases of imperfect self-defense, and the omission of the court, in such a case, to charge the jury in regard to the law of retreat is not, therefore, error.

**INDICTMENT** for murder in the second degree. The opinion states the case.

No brief for the appellant.

*R. H. Harrison, assistant attorney-general, for the state.*

**DAVIDSON, J.** Appellant was indicted for and convicted of murder in the second degree.

On the night of July 27, 1891, about twelve o'clock, Constable Burtschell and his posse, appellant being one of the number, shot and killed Earnest Weishun. The deceased rode into the town of Alleyton about dark and hitched his horse, took his saddle off and laid it on the ground, and disappeared until about midnight, when he returned, mounted his horse, and rode off north up the street. After proceeding a short distance, he was shot and killed by Burtschell and his posse. The wounds in his body were located as follows: "Five shot-holes a little to the right of left shoulder; five below shoulder; a little in the back, came out a little to right of left nipple, one shot in the left leg, about the ankle. There were eleven wounds in the body. . . . The shot entered left shoulder; a bullet entered left leg between knee and ankle, and came out in front." The witnesses testified that they thought these wounds were caused by buckshot, except the one in the leg, which was made by a pistol-ball of 44 or 45 caliber. All the shots entered from the rear. Weishun's horse was also shot in the left hip. The body was found lying in the street, about thirty or forty steps from where the firing parties were located.

Witness W. C. Davidson testified that he was justice of the peace, and Burtschell was his constable; that Burtschell came to him for some advice some time previous to the killing, on the same night. He said to witness: "I have been informed that a negro man by the name of Frank Lawson has threatened to kill a negro girl before Saturday night, and is here in town for the purpose of carrying out his threat; that he (Frank Lawson) has hitched his horse near the woman's house, in a clump of trees"; that he (Burtschell) had recognized the horse as belonging to Mr. Weishun, the deceased, but thought the negro Lawson had stolen the horse and rode him there; and



wanted witness to tell him (Burtschell) what he had best do. Witness told him to go and get two good men that he could depend on. Burtschell said he had already summoned John Hall and Tom Carter. Witness then told him to get two good white men. Burtschell then asked the witness, if the man should run when he attempted to arrest him, must he shoot him. Witness said, "No"; he would have no right to shoot him. Burtschell then asked witness, what must he do if the man should shoot at him first. Witness then said that would show that the man meant something wrong.

Deceased's whiskers were very nearly white. Deceased was a white man, and Lawson a negro. Burtschell went off, and about midnight the shooting occurred. This witness further said he "could not tell how many shots were fired; a volley first, then some other shots. Do not know how many."

About one o'clock that night, and about an hour after the shooting, the appellant, Walter Neal, August Burtschell, John Hall, and Mr. Morris came to witness. He saw no arms on them. When there, Neal said, in the presence of defendants, that something terrible had happened. "We have killed old man Weishun." Burtschell said that when deceased rode out into the road he (Burtschell) asked, "Who is that?" when deceased said, "Who in the hell are you?" and fired two shots at him (Burtschell). Burtschell said, at the time, he thought he had been hit. Burtschell said that he had been told that Lawson was coming that night to kill the negro woman; that he thought Lawson had stolen the horse, and had come to carry out his threat against the woman.

Morris testified that he was some five or six hundred yards away from the firing, and heard two shots fired first, and "after a little intermission, then a regular volley." He got up, dressed, and went on down by the body of deceased, and around to witness Davidson's, and failing to find anybody, returned along the same street about half an hour later, and met the defendants, four in company, and asked them what had happened. Jake Burtschell, brother of August Burtschell, who had got with defendants after the shooting, said: "An awful thing has happened"; that old man Weishun had been killed, by mistake, for Frank Lawson. This was in the presence of defendants. August Burtschell said: "The deceased pulled down a pistol and fired twice right in my face. I thought I was killed."

Sheriff Townsend testified that defendant, Carter, told him

that he had got a pistol from Mr. Jake Burtshell, and that he (defendant) fired two shots and Chapman fired one; that all defendant did was under August Burtshell's direction. "I saw a bullet-hole in the leg. It went in behind, and was a pistol-ball hole, 44 or 45 caliber. It broke both the bones in the leg. . . . I had ten, fifteen, or twenty searching for a pistol. We made diligent search all around and over in the cotton-patch for arms, and I inquired of everybody, black and white, if any person had seen any pistol. We found no pistol."

Other witnesses testified to the same effect, and it is uncontradicted that no pistol was found about the scene of the difficulty or on the body of deceased.

It was shown by all the witnesses that deceased was never known to swear or use such language as was imputed to him; that he never owned or carried a pistol or gun, and was afraid of guns and pistols, and never fired them; except one witness, who said he had a conversation with deceased, "about two or three years ago, about carrying arms. . . . I asked deceased, was he not afraid to go through the woods at night, and especially when he had money. He replied that he was always prepared to defend himself, and especially when he had money." It appears also that deceased was in the habit of loaning money, and sometimes carried it about his person.

Defendant testified that he was summoned by Burtshell to help arrest a man supposed to be Frank Lawson. He fully described the location of the different parties preparatory to the arrest, placing himself on a side street near where the body was found, in company with Chapman, and about fifty yards from Burtshell and Hall. Hall was armed with a shotgun, and the others with pistols.

At the time of the shooting, from the evidence of defendant and Neal, it appears the deceased was riding along the street, going north, toward where he lived. He lived nine miles from town, and was well known to all the parties. Defendant testified: "When deceased got opposite Burtshell and Hall, they halted him. Burtshell asked, 'Who is that?' The man on horseback answered, 'Who in the hell are you?' and the man on horseback pulled a pistol and fired twice. Then I heard other firing in the direction where Burtshell and Hall were stationed. I then fired one shot in the air, to scare him, and prevent him from coming by where we were. . . . The night was so dark I could not tell a white man from a negro, across the road." He denied telling Townsend that he fired twice.

Defendant's character was put in issue, and shown to be bad. He was a violent and dangerous man. There was no warrant in the hands of any of the party for the arrest of Lawson. This is the substance of the testimony.

There were several questions raised by appellant upon the charge of the court. The important question to our minds raised by the facts is, Did the court err in omitting to charge upon the law of manslaughter? Without recapitulating the evidence to support the state's theories, it was a question whether or not defendant's theories of the attempted arrest were true. It was evidently a contention on the trial that the deceased was shot at some distance from the firing party, as he quietly rode up the street; that he made no resistance, and had nothing to resist with, being unarmed; and that the story of defendant was manufactured for the purpose of affording an excuse for killing Frank Lawson. If this be correct, and Frank Lawson had been killed, it would have been murder of the first degree, and hence, in killing Weishun, through mistake, the parties would be guilty of murder. The charge upon this theory was given.

Defendant's position is, that when the party was halted for the purpose of arresting him, he fired upon them, and the constable's posse returned the fire and killed him. This may or may not be true, but does it not call for a charge on manslaughter? If defendant is correct, the attempted arrest was illegal. They had no warrant for the arrest of either party, and knew of both of the suspected felonies long before they undertook the arrest, and the constable so stated to the justice of the peace prior to the homicide. Before undertaking the arrest, it was incumbent upon them to secure a warrant; for, if honest in their belief that Lawson intended the death of the woman, or had stolen the horse, they knew it long prior to the attempted arrest, and there was ample time to secure such warrant. This was some time prior to the homicide.

Now, if the killing was superinduced by any other cause or motive than resistance to their attempt to arrest Lawson, the killing would be murder; or, had they intended to use the occasion as a pretext on their part to kill Lawson, then the killing would still be murder. But, on the other hand, suppose they only intended to arrest him, and were making the attempt illegally and without a warrant, the offense might be of no higher grade of homicide than manslaughter.

As said in *Mewly v. State*, 28 Tex. App. 274, 302, 8 Am. St.

Rep. 477: "A general, and as we believe a most humane and just, rule in the trial of one charged with murder is, that the jury should, as far as possible, judge of the facts surrounding the homicide from the stand-point of the defendant. In order to do this properly, they must have submitted to them in the charge of the court all the law legitimately and fairly arising upon the evidence which he has adduced in his defense. If the evidence be legal, competent, and admissible, then, when the court has admitted it, whether the court may believe it true or false makes no difference,—it becomes part of the case,—and the jury alone have the right to say, under appropriate instructions pertinent to it, what degree of credibility shall be accorded the witnesses who have testified, and what weight shall be given to the testimony, and they also have the right to pass upon all issues legitimately arising upon such testimony. The statute enjoins it that the charge shall distinctly set forth the law applicable to the case." Again, as was said in *Partlow's case*, and quoted approvingly by this court in *Meuly's case*: "The assertion of the doctrine that one who begins a quarrel or brings on a difficulty with the felonious purpose to kill the person assaulted, and accomplishing such purpose, is guilty of murder, and cannot avail himself of the doctrine of self-defense, carries with it, in its very bosom, the inevitable corollary, that if the quarrel be begun without a felonious purpose, the homicidal act will not be murder. To deny this obvious deduction is equivalent to the anomalous assertion that there can be a felony without a felonious intent; that the act done characterizes the intent, and not the intent the act": *State v. Partlow*, 90 Mo. 608; 59 Am. Rep. 31; *Reed v. State*, 11 Tex. App. 510; 40 Am. Rep. 795; *Peter v. State*, 23 Tex. App. 684; *Meuly v. State*, 26 Tex. App. 274, 305, 306; 8 Am. St. Rep. 477.

Now, if the intent of the defendant was only to make an illegal and unwarranted arrest, this would not constitute a felony. If the arrest had been accomplished, it would have constituted only false imprisonment on the part of defendant, and in this state this is but a misdemeanor.

The fact that the party arrested, or sought to be arrested, without warrant may be shown to have been justly suspected of felony will not justify a homicide on the part of the officer, if he had no warrant, unless he bring himself within some of the rules laid down authorizing such arrest without warrant:

*Staples v. State*, 14 Tex. App. 136; *Jacobs v. State*, 28 Tex. App. 79; *Ex parte Sherwood*, 29 Tex. App. 334.

An officer having lawful authority to make an arrest may, on meeting with resistance, use such force as may be necessary to overcome such resistance, but he is not authorized to use greater force than is necessary for the arrest and detention of the accused party: *Beaverts v. State*, 4 Tex. App. 175; *Giroux v. State*, 40 Tex. 97.

But this rule does not apply where the officer, in violation of law, undertakes to arrest a party without a warrant, nor in cases where he has not the right to make such arrest. As we have seen, the defendant was engaged in attempting to make an unlawful arrest. Now, it is clear that he was in the wrong, because he was engaged in the attempt to perpetrate false imprisonment, and on account of that wrong was placed in a situation where, taken most strongly in his favor, it was necessary for him to defend himself against an attack made upon himself superinduced by that wrong. In such case the law justly limits his right of self-defense, and regulates it according to the magnitude of that wrong.

In Reed's case, White, P. J., said: "Whenever a party, by his own wrongful act, produces a condition of things wherein it becomes necessary for his own safety that he should take life, or do serious bodily harm, then, indeed, the law wisely imputes to him his own wrong and its consequences, to the extent that they may and should be considered in determining the grade of the offense, which, but for such acts, would never have been occasioned. Mr. Bishop says: 'The rule is commonly stated in the American cases thus: If the individual assaulted, being himself without fault, reasonably apprehends death or serious bodily harm to himself unless he kills the assailant, the killing is justifiable': 1 Bishop's Crim. Law, sec. 865. But a person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself: *State v. Neeley*, 20 Iowa, 108; *Adams v. People*, 47 Ill. 376; *State v. Starr*, 38 Mo. 270; *People v. Hunt*, 59 Cal. 430; *Wills v. State*, 73 Ala. 362; *Barnett v. State*, 100 Ind. 171; *Story v. State*, 99 Ind. 413. That is, it will not afford him a justification in law. How far and to what extent he will be excused or excusable in law must depend upon the nature and character of the act he was committing, and which produced the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in

limiting his right of defense and resistance while in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and to prevent its commission the party seeing it, or about to be injured thereby, makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slays his assailant, the law would impute the original wrong to the homicide, and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law": *Reed v. State*, 11 Tex. App. 509, 517, 519; 40 Am. Rep. 795; Pen. Code, art. 49.

Defendant's theories of defense in this case were mistaken identity and self-defense. In Peter's case, Judge Hurt said: "The defenses interposed are mistaken identity and self-defense. For the purpose of this opinion, the former will be considered as though Leck Crook had been the subject of the homicide." In that case the deceased was mistaken for Leck Crook, as the deceased in this case was mistaken for Lawson. "It will be further assumed as true," says that opinion, "that deceased, at the time the fatal shot was fired, was indicating by some act done a purpose to kill appellant or do him some serious bodily harm. The question then arises, How far, under the circumstances, did the right of self-defense attach? . . . Having then killed Leck Crook (or his legal equivalent) in the attempt to illegally arrest him, the homicide cannot be of a less grade than manslaughter, though done upon reasonable apprehension of danger. The slayer in such case stands in the attitude of a trespasser, his situation being analogous to that of him who provokes the difficulty, or furnishes the occasion therefor, in the course of which he slays his adversary to save himself": *Peter v. State*, 23 Tex. App. 684, 687; *King v. State*, 13 Tex. App. 277.

"Cases may arise in which an original trespasser, or one who provokes or furnishes the occasion for a difficulty, becomes entitled to the right of full and perfect self-defense. But this right being forfeited or abridged by his own act, it must be revived by his own act; as where one condones the trespass or wrong by retiring from the difficulty in an unequivocal manner, and his adversary then renews the combat. In such case, the nature and character of the original trespass or provocation enters as an element in illustrating the *animus* of the party renewing the difficulty, and fixes the grade of the

offense committed in its progress": *Peter v. State*; 23 Tex. App. 684.

The principles and rules of law above announced are well settled by the decisions of this court as well as the great weight of authority. They are applicable to the evidence in this case as disclosed in the statement of facts, and a charge in accordance therewith should have been given the jury.

It is suggested by the assistant attorney-general, in his confession of error, that the law of retreat is not given in charge in connection with the law of self-defense. Whenever the question of justifiable homicide is raised by the evidence, the court should fully instruct the jury in regard to the law of self-defense and retreat as enunciated in articles 573 and 574 of the Penal Code; but the doctrine of retreat is not applicable to cases of imperfect self-defense, and hence its omission is not error in this case.

It is contended that the evidence is insufficient to support the verdict and judgment against the appellant. We do not concur with him in this contention, but refrain from discussing the testimony, in view of another trial of the case.

For the errors indicated, the judgment is reversed and the cause remanded.

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**WHERE DEATH ENSUES IN THE PURSUIT OF AN UNLAWFUL DESIGN**, without any intention to kill, it will be either murder or manslaughter, as the intended offense is felony or only a misdemeanor: *State v. Smith*, 32 Mo. 369; 54 Am. Dec. 578; *Smith v. State*, 33 Mo. 48; 54 Am. Dec. 607.

**DUTY OF COURT AS TO INSTRUCTIONS.** — It is the imperative duty of the trial court, in a prosecution for murder, to instruct the jury upon the lower grades of homicide, if by any possible legitimate construction of the evidence they might convict of a homicide of a grade inferior to murder in the first degree: *Jones v. State*, 29 Tex. App. 338. But where the evidence does not present the issue of manslaughter, it is not error to refuse to instruct the jury thereon: *Floyd v. State*, 29 Tex. App. 349. On the other hand, when the evidence distinctly presents the issue of murder in the first degree, an instruction submitting that issue is required: *Blackwell v. State*, 29 Tex. App. 194. Both of these rules are an application of the general principle that a charge of the court, to be sufficient, must instruct the jury fully upon all the issues of the case: *Bonner v. State*, 29 Tex. App. 223; *Luckinbill v. State*, 52 Ark. 45. A judgment, however, will not be reversed because of error in giving instructions on grades of homicide not authorized by the evidence where the conviction was not on such grades: *State v. Stockwell*, 106 Mo. 36.

**JUDGING DEFENDANT'S ACTS FROM HIS OWN STAND-POINT.** — The court ought to instruct the jury that the facts surrounding the homicide are to be judged from the defendant's stand-point: *Bonner v. State*, 29 Tex. App. 223; *Smith v. State*, 25 Fla. 517.

**INTENT IS ESSENTIAL TO CONSTITUTE CRIME OF MURDER.** — The principle that criminality cannot exist without criminal intent is expressed in the familiar maxim, *Actus non facit reum sed mens rea*. For an instance of its application to the crime of murder, see *Schaffer v. State*, 22 Neb. 557; 3 Am. St. Rep. 274. But this criminal intent need not be an actual intent to kill: *State v. Lang*, 65 N. H. 284. Thus an assault and battery inflicted with a designed intent, and resulting in death, is murder: *State v. Alexander*, 30 S. C. 74; 14 Am. St. Rep. 879. As to the evidence from which actual intent to kill may be inferred, see note to *State v. Deschamps*, 21 Am. St. Rep. 399. The declarations and conduct of a defendant, either before or after the offense, are admissible evidence against him, as indicating his intent or motive: *Weathersby v. State*, 29 Tex. App. 278.

**HOMICIDE COMMITTED IN SELF-DEFENSE.** — Where deceased, attempting an illegal arrest, makes an unlawful attack upon the accused, reasonably calculated to create in a man of ordinary mind a belief that deceased was about to inflict upon him death or serious bodily injury, the right of the accused to kill in such case is complete: *Jones v. State*, 26 Tex. App. 1; 8 Am. St. Rep. 454. Compare *Creighton v. Commonwealth*, 84 Ky. 103; 4 Am. St. Rep. 193; *Smith v. State*, 25 Fla. 517. But where the difficulty is brought on by the accused himself, for the purpose of wreaking his malice upon deceased by slaying him, or doing him some great bodily harm, and actuated by such felonious purpose he does the killing, he is guilty of murder, and cannot shelter himself under the plea of self-defense: *State v. Herrell*, 97 Mo. 105; 10 Am. St. Rep. 289. Compare *Gibson v. State*, 89 Ala. 121; 18 Am. St. Rep. 96; *Bonnard v. State*, 25 Tex. App. 173; 8 Am. St. Rep. 431; *State v. Hawkins*, 18 Or. 476; *Helm v. State*, 67 Miss. 562. In Missouri, a killing by a person who has provoked a difficulty, but without any felonious purpose, is manslaughter in the fourth degree, the ground of self-defense not being an entire justification: *State v. Parker*, 106 Mo. 217. Nor can a peace-officer plead self-defense in justification of a homicide the necessity for which grew out of his own wrongful act in making the arrest: *Roberson v. State*, 53 Ark. 516.

**DUTY TO RETREAT.** — The general rule is, that no person is excused for taking human life, if, with safety to his own person, he could have avoided or retired from the combat: *Davis v. State*, 92 Ala. 20. But the slayer is not obliged to retreat before exercising his right of self-defense, unless there are means of escape which are apparent to him under the circumstances in which he is placed: *State v. Roberts*, 63 Vt. 139. Even if the slayer has provoked the difficulty originally, his rights of self-defense revive, if he withdraws in good faith from the conflict, and expresses a desire for peace: *Brazill v. State*, 28 Tex. App. 584; *Duncan v. People*, 134 Ill. 110. If the withdrawal is apparently for the purpose of securing a position from which to renew the combat with greater effect, the assailed person is not obliged to suspend his defense: *Luckinbill v. State*, 52 Ark. 45. The question of good or bad faith in such a case should be left to the jury: *Parker v. State*, 88 Ala. 4.

**THE CIRCUMSTANCES WHICH WILL EXCUSE THE SLAYER FROM RETREATING** are discussed in *State v. Evans*, 33 W. Va. 418, following *State v. Cain*, 20 W. Va. 679. It is not necessary for a person, if without fault, when suddenly assaulted upon the public highway or upon his own premises, and when an instant's delay may be at the expense of his own life, to retreat before using his own weapon: *People v. Macard*, 73 Mich. 15.



**SELF-DEFENSE.** — To sustain the plea of self-defense, the jury must find, —  
1. That the accused believed at the time that he was in such immediate danger of losing his life or sustaining serious bodily harm that it was necessary for his own protection to take the life of his assailant; and 2. That those circumstances were such as would justify such a belief in the mind of a person of ordinary firmness and reason: *State v. Wyse*, 33 S. C. 532. The danger must appear to be such to the defendant, and not to the jury: *People v. Bruggs*, 93 Cal. 476. It is error to instruct the jury to base their verdict on what they believe they would have done if they had been "in the shoes of the defendant at the time": *State v. Wyse*, 33 S. C. 532. Accordingly, a belief that the danger is such as to justify the killing may be "well founded," although there may be no actual danger: *People v. Donguk*, 92 Cal. 607. The test is, whether the defendant, as a reasonable man, was justified in thinking that he could not save himself from bodily harm without killing his assailant: *People v. Bruggs*, 93 Cal. 476; *State v. Wyse*, 33 S. C. 532; *State v. Parker*, 106 Mo. 217.

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## ADVERSE POSSESSION.

1. **FACTS INSUFFICIENT TO CONSTITUTE.** — Where one claims title by adverse possession to uninclosed and uncultivated land, upon which no one resided, and upon which the cattle of neighboring ranchers roamed and grazed without restraint, the fact that the claimant, through his lessee, erected a rude shed upon the land capable of affording shelter to a few animals, but not used for any purpose, is not sufficient to constitute an adverse possession, in the absence of express notice to the real owner that such occupancy was hostile and adverse. *De Fries v. Quint*, 151.
2. **ESSENTIAL ELEMENTS OF.** — In order to constitute title by adverse possession, the occupancy of the land must be sufficiently open and notorious to notify an ordinarily prudent owner of such possession, and of its hostile character, unless he is otherwise actually notified of these facts; and to be available against persons dealing with the owner of the land, the occupancy of the land must be of such character, at least, as should put them upon inquiry as to the title of occupant. *De Fries v. Quint*, 151.
3. **BOUNDARY LINE — NO ADVERSE POSSESSION WHERE EACH PARTY CLAIMS ONLY TO TRUE LINE BETWEEN THEM.** — A party in possession of land, claiming only to the true line according to the deed under which he holds, who has never been in actual occupancy or claimed beyond the true line and regardless of it, is only entitled to the quantity called for by his deed, although he is mistaken as to the true location of the boundary line. Where adjacent owners of land claim only to the true line

- between them, without intending to claim beyond it, the possession of one beyond the true line is not adverse to the other. *Kane v. Brum*, 435.
4. **THE BURDEN OF PROVING** all the essential elements of an adverse possession, including its hostile character, is upon the party relying upon it. *De Friese v. Quint*, 151.
  5. **VENDOR AND VENDEE — STATUTE OF LIMITATIONS RUNS IN FAVOR OF VENDEE IN POSSESSION AGAINST CLAIM OF DOWER OF VENDOR'S WIDOW.** — A vendee of land in possession under an executory contract does not hold adversely to the vendor, so long as the purchase-money remains unpaid, and the statute of limitations will not begin to run in his favor; but such possession of the vendee is adverse to a claim of dower in the land made by the vendor's widow, and the statute will run in his favor against such claim. *Long v. Kansas City Stock-yards Co.*, 413.
  6. **PLEADING — STATUTE OF LIMITATIONS.** — A complaint alleging the plaintiff to have been the owner of real property for more than five years previously to the commencement of the action, and that the defendant entered upon such property and ousted plaintiff therefrom at a time named, also more than five years before the filing of the complaint, is not subject to demurrer on the ground that it shows that the plaintiff's cause of action is barred by the statute of limitations declaring that "no action for the recovery of real property shall be maintained unless the plaintiff, or those under whom he claims, have been seised or possessed of such property within five years before the commencement of the act in respect to which the action is prosecuted." There is nothing in the complaint tending to show that the defendant's acts were accompanied with any claim of title on his part. *Peter v. Stephens*, 447.

#### AFFIDAVITS.

See CERTIORARI, 2; CRIMINAL LAW, 12; ELECTIONS, 3; SALES, 2.

#### AGENCY.

1. **RATIFICATION IN WRITING BY VENDOR OF SALE BY AGENT EQUIVALENT TO PRIOR WRITTEN AUTHORITY WHEN.** — A contract for the sale of land, signed for the vendor by an agent not authorized by writing to sign, will, under the Pennsylvania statute of frauds, have the same force and effect, when ratified in writing by the vendor, as though signed by the agent in pursuance of lawful authority in writing, provided the vendee has not rescinded it before such ratification. Where, therefore, an agent of an equitable owner of land, without being thereto authorized by writing, signs for his principal an agreement to transfer to another the contract under which the principal holds the land, and subsequently the principal, at the request of the other party, executes a formal assignment written on the same sheet of paper with the agreement to transfer, and specifying the same consideration, such assignment will operate as a written ratification of the agreement executed by the agent, and take it out of the operation of the statute of frauds, notwithstanding the purchaser under the agreement refuses to accept the assignment when afterwards tendered to him. *McClintock v. South Penn Oil Co.*, 785.
2. **PRESUMPTION AS AGAINST ASSUMED AGENT.** — Where one sells the land of another under an assumed authority to do so, this, as against him, is *prima facie* evidence of written authority; and when the question of agency becomes material, the burden of proof is upon him to rebut the presump-

tion arising from his claim of authority. *Montgomery v. Pacific Coast Land Bureau*, 122.

3. **IF ONE WHO IS DEALING WITH AN AGENT** knows that he is acting under circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, whether the agent is general or special, because principals may limit the authority of one as well as of the other. *Quintan v. Providence etc. Ins. Co.*, 645.
4. **COMMON CARRIERS — LIABILITY OF, FOR TORTIOUS ACT OF AGENTS.** — If a ticket agent of a railway company, after the purchase by a woman of a ticket from him, immediately comes upon the platform of the station and there charges her with giving him counterfeit money, and insists upon her giving him another piece in lieu of that received by him from her, and upon her refusal to do so, places his hand upon her shoulder, tells her not to stir until he has procured a policeman to arrest and search her, and calls her a counterfeiter and a common prostitute, such agent is acting for his employers in an endeavor to protect or recover their property, and they are answerable in damages for what he does and says. Though injury and insult are acts in departure from the authority conferred or implied, nevertheless when they occur in the course of the employment, the master is answerable for the wrong committed. *Palmer v. Manhattan R'y Co.*, 632.
- See AUCTIONS, 3; BROKERS; CORPORATIONS, 14; HUSBAND AND WIFE, 8, 11, 15, 16; INSURANCE, 7-15; INTOXICATING LIQUORS; JUDGMENTS, 5; MISTAKE; RAILROADS, 2; SALES.

#### ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE, 5.

#### ALLEGATIONS.

See PERJURY; PLEADING, 9; TRIAL, 5.

#### ALTERATION.

See OFFICERS, 1; STATUTES, 6.

#### ANIMALS.

1. **VICIOUS DOG — NOTICE TO AND LIABILITY OF OWNER.** — Actual or implied notice to the owner of a dog that its disposition is such that it would be likely to bite persons if allowed to run at large, and commit an injury similar to the one complained of, is sufficient to make the owner liable in damages, without proof that the dog had previously bitten any person; and the fact that it broke loose, or was untied by some other person, and without the owner's knowledge or consent, will not, of itself, exempt him from liability for injury inflicted by the dog while so at large. *Robinson v. Marino*, 50.
2. **VICIOUS DOG — EVIDENCE.** — In an action to recover for injury from the bite of a vicious dog, evidence that on a prior occasion the same dog had bitten, or attempted to bite, a third person, is admissible to show the viciousness of the dog. *Robinson v. Marino*, 50.
3. **VICIOUS DOG — SUFFICIENCY OF EVIDENCE.** — In an action to recover for injury from the bite of a dog alleged to be vicious, evidence that the dog had always been kept chained; that he would bark and jump at persons going near him when chained, and endeavor to get loose; that when at large he had run after a woman and seized her dress; that his

owner had stated that he feared that the dog would get loose and bite a child; and that when at large he had inflicted the injury complained of, — is sufficient to establish the viciousness of the dog, his owner's knowledge thereof, and his negligence in allowing him to be at large. *Robinson v. Marino*, 50.

4. **VIOLENT DOG — EXPERT EVIDENCE AS TO CAUSE OF WOUNDS.** — In an action to recover for injury from the bite of a vicious dog, the opinion of a practicing physician and surgeon, as to what was the probable cause of the wounds inflicted on the complaining party, is admissible. *Robinson v. Marino*, 50.
5. **VIOLENT DOG — PHYSICAL PAIN AND MENTAL ANGUISH AS ELEMENTS OF DAMAGE.** — A person injured by a dog known by his owner to be vicious may recover damages for all the direct and necessary results of the injury received, including physical pain and mental anguish. Such damages are implied by law, and need not be specially alleged. *Robinson v. Marino*, 50.

See **LABORER; RAILROADS**, 8.

#### ANTENUPTIAL CONTRACT.

See **HUSBAND AND WIFE**, 10.

#### APOTHECARIES.

**EVIDENCE — BURDEN OF PROOF.** — THE LIABILITY OF DRUGGISTS is the same as that governing the liability of professional persons whose work requires special knowledge or skill, and such a person is not legally responsible for an unintentional consequential injury resulting from a lawful act when the failure to exercise proper care cannot be imputed to him, and the burden of proving such lack of care, when the act is lawful, is upon the plaintiff. *Allan v. State Steamship Co.*, 556.

#### APPEAL.

1. **AN APPEAL MAY BE TAKEN FROM PART OF A JUDGMENT** under a statute authorizing an appeal from a judgment, or any part thereof. *Bank of Commerce v. Fuqua*, 461.
2. **AN ORDER STRIKING OUT A PART OF AN ANSWER** is reviewable upon appeal from a final judgment, though no formal bill of exceptions has been presented or settled. *Bank of Commerce v. Fuqua*, 461.
3. **REVIEW OF POINT NOT RAISED AT TRIAL.** — A mortgage will not be held void on appeal for uncertainty in description when the point was not raised in the court below, and the record does not show error in treating the description as sufficient. *Kennedy v. Boykin*, 838.
4. **JUDGMENT NOT DISTURBED WHERE EVIDENCE CONFLICTING.** — Where the evidence as to the guilt or innocence of the accused is directly conflicting, the appellate court will not disturb the verdict and judgment. *Hooper v. State*, 926.
5. **OBJECTION TO COMPETENCY OF WITNESS AS AN EXPERT** not made in the lower court will not be noticed on appeal. *Robinson v. Marino*, 50.
6. **DAMAGES, INSTRUCTION TO CONSIDER QUESTION OF, FROM LIBERAL POINT OF VIEW, UNWISE.** — In an action against a corporation for a negligent killing, it is at least unwise for a judge to instruct the jury that they should look at the question of damages "from a broad and sensible point of view, and liberal, because it is not a case to cut off corners to."

closely," although perhaps such an instruction is not of itself sufficient to justify a reversal. *Steinbrunner v. Pittsburgh etc. R'y Co.*, 806.

7. **WHERE A FACT IS FOUND BY THE TRIAL COURT**, and the finding is not excepted to, the appellate court will assume that the evidence upon which the finding was based was received without objection, and that the absence of the pleading was waived. *Ashton v. Rochester*, 619.
8. **IMPROPER ARGUMENT OF COUNSEL NOT GROUND OF REVERSAL WHEN.** — Improper and unwarranted remarks of prosecuting counsel in argument in a criminal case, though always reprehensible, do not constitute cause for reversal, unless, under all the circumstances of the case, they were calculated to prejudice the rights of the accused. *Rahm v. State*, 911.
9. **ERRONEOUS STATEMENT OF EVIDENCE IN CHARGE TO JURY, GROUND OF REVERSAL WHEN.** — An erroneous statement of the evidence upon the pivotal fact in the case, in the charge to the jury, is a ground of reversal, even though inadvertently made and inconsistent with the portion of the charge which immediately precedes it, since the influence which such statement may have had with the jury cannot be determined. *Steinbrunner v. Pittsburgh etc. R'y Co.*, 806.
10. **BILLS OF EXCEPTIONS MUST SHOW ERRORS COMPLAINED OF.** — Bills of exception to the admission or exclusion of evidence, to be entitled to the consideration of the appellate court, must show the errors complained of by the appellant. *Rahm v. State*, 911.
11. **ERROR WITHOUT PREJUDICE WILL BE DISREGARDED ON APPEAL.** *Nave v. Adams*, 421.
12. **JUDGMENTS. — RESTITUTION** was a remedy well known at the common law. Its object was to restore to the appellant the specific thing, or its equivalent, of which he had been deprived by the enforcement of the judgment against him during the pendency of his appeal. It was usually a part of the judgment of reversal which directed "that the defendant be restored to all things which he has lost on occasion of the judgment aforesaid." *Haebler v. Myers*, 589.
13. **JUDGMENTS. — RESTITUTION WILL BE ENFORCED THOUGH THE MONEY WAS NOT RECEIVED UNDER AN EXECUTION**, nor under a final judgment. Hence, if moneys have been paid to the sheriff under an attachment, and persons claiming as lien-holders procure an order vacating the attachment, and thereupon the sheriff pays such moneys to them, and the order vacating the attachment is afterwards reversed upon appeal, the attaching creditors, having in the mean time recovered final judgment in their action, are thereupon entitled to recover from such lien claimants the moneys thus obtained by them. The law interposes a promise to pay such moneys to the attaching creditors, because, though they did not hold the title, they did have a paramount lien, which, in due course of procedure, would have ripened into title but for the erroneous order vacating the attachment. *Haebler v. Myers*, 589.
14. **JUDGMENT. — A WRIT OF RESTITUTION ISSUED AT THE COMMON LAW** upon the reversal of a judgment, provided the amount which the appellant had lost, or paid under compulsion, appeared of record. Otherwise, process in the nature of an order to show cause first issued, known as *scire facias quare restitutionem habere non debet*, based upon the theory that the law infers a promise to repay moneys paid upon or in satisfaction of a judgment or order which has been reversed. *Haebler v. Myers*, 589.
15. **MODIFICATION OF JUDGMENT.** — Where a judgment on demurrer dismissing a complaint is affirmed on appeal, the appellate court will modify



the judgment on motion so as to remand the case with leave to amend the complaint. *Wagner v. Law*, 56.

See HABEAS CORPUS; JUDGMENTS, 8, 11; NEW TRIAL; PARTIES; TRIAL, 2

#### APPEARANCE.

See JUSTICE OF THE PEACE.

#### APPROPRIATION.

See ASSIGNMENT, 3; CHECKS; LEGISLATURE, 3, 4; OFFICERS, 8; WATERCOURSES, 11, 12.

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See CRIMINAL LAW, 3.

#### ASSESSMENTS.

See CORPORATIONS, 8; EQUITY, 2; ESTOPPEL, 5; JUDGMENTS, 6; MUNICIPAL CORPORATIONS, 11; TAXES, 1-3.

#### ASSETS.

See CORPORATIONS, 10, 15; FRAUDULENT CONVEYANCES, 4.

#### ASSIGNMENT.

1. ASSIGNMENT OF PART OF DEMAND AT LAW. — A part of an entire demand cannot be assigned at law so as to enable the assignee to bring an action upon it without the consent of the debtor. *McDaniel v. Maxwell*, 740.
2. ASSIGNMENT OF PART OF DEMAND IN EQUITY. — Parts of a single demand may be assigned to different parties in equity, and the rights of all the parties settled in one suit brought by a single assignee. In such suit, not only the debtor and assignor, but all assignees or claimants to any part of the fund, can be made parties, so that one decree may determine the duty of the debtor to each claimant, and his rights and interests be fully protected thereby. *McDaniel v. Maxwell*, 740.
3. ASSIGNMENT OF PART OF DEMAND IN EQUITY. — AN ORDER drawn upon the debtor for a valuable consideration, payable out of a designated fund or debt, actually due or to become due, operates, when delivered to the payee, as an equitable assignment or appropriation of such fund *pro tanto*, and no acceptance by the drawee is necessary to its validity. *McDaniel v. Maxwell*, 740.

4. **ASSIGNMENT OF PART OF DEMAND IN EQUITY. — NO PARTICULAR FORM** of words or writing is necessary to effect an equitable assignment of a part of a specific debt or fund due or to become due. It may be wholly in writing, or in parol, or partly in both, but it must designate the particular fund upon which it is intended to operate. *McDaniel v. Maxwell*, 740.
5. **ASSIGNMENT OF PART OF DEMAND IN EQUITY — NOTICE TO DEBTOR. —** An assignment of a specific part of a particular fund, sum of money, or debt actually due or to become due, is valid in equity, and vests an equitable property therein in the assignee, so that after notice thereof to the debtor he is bound to apply the fund according to the terms of the assignment. *McDaniel v. Maxwell*, 740.
6. **THE ASSIGNMENT OF A CONTINGENT REMAINDER OR AN EXECUTORY DEVISE**, free from fraud or imposition, and for a valuable consideration, will be upheld in equity, though void at law. *Watson v. Smith*, 665.  
See AGENCY, 1; CORPORATIONS, 10, 12; MORTGAGES, 2.

#### ASSIGNMENT FOR BENEFIT OF CREDITORS.

- INSOLVENT DEBTOR. — CHATTEL MORTGAGES** executed at the same time by an insolvent debtor to certain of his creditors, giving them priority, but not allowing them to prorate, if made in good faith to secure *bona fide* debts, will not constitute a voluntary and fraudulent assignment for the benefit of the creditors preferred as against those not preferred, although such mortgages cover all the assets of the mortgagor, the value of which exceeds the amount of debts secured. *Hershiser v. Higman*, 527.  
See CONTRACTS, 4; PAYMENT.

#### ASSOCIATIONS.

1. **SOCIAL CLUBS — LIQUOR LICENSE. —** The distribution of liquors at cost by a *bona fide* incorporated social club to its members is not a sale for which a license can be required, under a general liquor law not specially mentioning such clubs. *Columbia Club v. McMaster*, 826.
2. **MUNICIPAL CORPORATIONS, POWER OF, TO IMPOSE A LICENSE ON SOCIAL CLUBS. —** Where the general law does not require a license for the distribution of liquors by a *bona fide* social club among its members, such license cannot be imposed by municipal ordinance. *Columbia Club v. McMaster*, 826.

#### ATTACHMENT — GARNISHMENT.

1. **GARNISHMENT OF OFFICER. — THE SURPLUS PROCEEDS OF THE SALE OF PROPERTY** in the hands of an officer of the court, after satisfying an execution or other process, belongs to the judgment debtor, is not in *custodia legis*, and is therefore subject to garnishment or attachment by his creditor. *Oppenheimer v. Marr*, 539.
2. **GARNISHMENT IN ANOTHER STATE. —** A judgment in a garnishment suit, valid and binding upon the parties thereto, is entitled to full faith and credit in another state, and cannot be collaterally attacked. Payment and satisfaction of such judgment by the garnishee is a complete defense for him to an action in another state to recover the same debt. *Chicago etc. R. R. Co. v. Moore*, 534.  
See APPEAL, 13.

## ATTORNEY AND CLIENT.

**PRIVILEGED COMMUNICATIONS BETWEEN, WHAT IS NOT.** — Where an attorney at law prepares and writes an order for the defendant to sign, which the defendant subsequently swears that he did not sign, such attorney is a competent witness to prove its execution by the defendant, and the rule of privileged communications as between attorney and client does not apply in such a case. *Rahm v. State*, 911.

See AUCTIONS, 2; VENDOR AND PURCHASER, 7.

## ATTORNEY IN FACT.

See HUSBAND AND WIFE, 13; PUBLIC LANDS, 2.

## ATTORNEY'S FEES.

See NEGOTIABLE INSTRUMENTS, 4-7; PLEADING, 10.

## AUCTIONS.

1. **AUCTION SALE OF LAND—PRINTED CATALOGUE—WARRANTY OF TITLE.** — When the terms of an auction sale are announced in advance, by means of a printed catalogue, describing different tracts of land belonging to different persons, stating the terms of sale at the end of each description, and concluding with a statement warranting the title perfect, allowing time for search, and requiring a partial payment upon the fall of the hammer, the concluding statement in the catalogue becomes a part of the terms of sale of each tract of land described therein. *Montgomery v. Pacific Coast Land Bureau*, 122.
2. **AUCTION SALES OF LAND—LIABILITY OF AUCTIONEER—MEANING OF PRINTED TERMS OF SALE.** — When an auctioneer sells land under the printed terms of a catalogue, and receives a portion of the purchase-money, which he returns to the purchaser because of an alleged defect in title after a tender of proper conveyance by the owner, and written notice not to return the money, the opinion of attorneys who pronounced the owner's title unsafe, and evidence as to the meaning of the printed terms of the sale, are not admissible in an action by the owner against the auctioneer to recover the money returned by him to the purchaser. *Montgomery v. Pacific Coast Land Bureau*, 122.
3. **AUCTION SALE OF LAND—AUTHORITY AND LIABILITY OF AUCTIONEER—AGENCY—RATIFICATION.** — When one sells the land of another at auction, assuming to act as his agent, and receives a portion of the purchase-money, which he returns to the purchaser because of an alleged defect in the title, after the owner has tendered a deed to the purchaser, and has notified the agent in writing not to return the money, the acts of the owner are such a ratification of the agent's acts as will entitle the former, upon showing a good record title, to recover of the latter the purchase-money returned, as money received and had to the use and benefit of the former. *Montgomery v. Pacific Coast Land Bureau*, 122.

## BANKRUPTCY.

See INSOLVENCY.

## BANKS.

See CHECKS; CONTRACTS, 3, 4; LIMITATIONS OF ACTIONS, 4; PAYMENT, 1.

**BILLS AND NOTES.**

See **NEGOTIABLE INSTRUMENTS.**

**BILLS OF EXCHANGE.**

See **APPEAL**, 2, 10; **CERTIORARI**, 2.

**BONA FIDE PURCHASERS.**

See **EXECUTION**, 6, 7; **NEGOTIABLE INSTRUMENTS**, 2.

**BONDS.**

See **OFFICERS**, 1-6.

**BOUNDARIES.**

1. **SHORE.** — Where the courses and distances designated in a conveyance are such as to extend the property conveyed to low-water mark of Long Island Sound, it will include all the shore above such mark, though one of the calls is to a point on the shore, and the next call is "thence running along said shore and sound as the same bend and turn." The point on the shore called for in the description may be anywhere upon the strip lying between low and high water, and where it is must, therefore, be determined from the courses and distances given in the conveyance. *Oakes v. De Lancey*, 628.

2. **THE WORDS "MORE OR LESS" AND "ABOUT,"** used in a conveyance in connection with quantity or as qualifying distances, are words of precaution and safety intended to cover some unimportant inaccuracy, and they do not weaken or destroy such indications of distance and quantity, when no other guides are furnished. *Oakes v. De Lancey*, 628.

See **ADVERSE POSSESSION**, 3

**BREACH OF CONTRACT TO MARRY.**

See **MARRIAGE AND DIVORCE.**

**BRIBERY.**

See **CRIMINAL LAW**, 12.

**BROKERS.**

**BROKER EMPLOYED TO SELL PROPERTY BECOMES ENTITLED TO HIS COMMISSION** when he finds a purchaser satisfactory to his employer and they enter into a mutual contract of purchase and sale, though it subsequently turns out that the purchaser is unable to comply with his contract, and on that account the sale is not consummated by the transfer of the property. *Kalley v. Baker*, 542.

**BURDEN OF PROOF.**

See **ADVERSE POSSESSION**, 4; **AGENCY**, 2; **APOTHECARIES**; **MUNICIPAL CORPORATIONS**, 8; **RAILROADS**, 12; **SLANDER**, 8; **TAXES**, 1.

**BURGLARY.**

**CRIMINAL LAW — BURGLARY AND LARCENY.** — One who enters a building under such circumstances as to constitute a burglary, and also commits

therein the crime of larceny, may be prosecuted, convicted, and punished for each crime separately. *State v. Hackett*, 390.

See CRIMINAL LAW, 7; EVIDENCE, 4.

### BURIAL RIGHTS.

See CEMETERIES; CORPSES; DAMAGES, 7.

### CALLS.

See BOUNDARIES, 1; CORPORATIONS, 6-8, CREDITOR'S SUIT.

### CARRIERS.

1. **DISCRIMINATION.** — A complaint in an action against a common carrier to recover for discrimination in freight charges which simply alleges a discrimination and inequality in charges made for the transportation of the same kind of freight for different persons between the same points, without alleging that the freight charged plaintiff is unreasonable and excessive, does not state a common-law cause of action. *Cowden v. Pacific etc. Steamship Co.*, 142.
  2. **COMMON-LAW RIGHT OF DISCRIMINATION.** — At common law, a common carrier is bound to accept and carry goods for all upon being paid a reasonable compensation, but he is under no obligation to treat all customers equally, and he may carry for favored individuals at an unreasonably low rate, or even *gratis*. The fact that he charges less for one than another is only evidence that a particular charge is unreasonable, and the difference between the charges cannot be made the measure of damages in any case, unless it is proved that the smaller charge is the true reasonable charge, and that the higher charge is excessive to that degree. *Cowden v. Pacific etc. Steamship Co.*, 142.
  3. **DAMAGES — EXEMPLARY, AGAINST CARRIER — WILLFUL WRONG OF SERVANT.** — The duty due from a common carrier to its passengers makes it liable in exemplary damages for the willful wrong of its servant, inflicted in the course of his employment, unless the party wronged is guilty of contributory negligence. *Spellman v. Richmond etc. R. R. Co.*, 358.
- See AGENCY, 4; INTERSTATE COMMERCE; JURISDICTION, 1; SHIPS AND SHIPPING.

### CATALOGUE.

See AUCTIONS, 1, 2.

### CEMETERIES.

- A CEMETERY IS NOT DEVOTED TO PUBLIC USES, when the public generally never had any right to burial therein, and no burials therein could be made except by permission of the church corporation to which it belonged. *Matter of Board of Street Opening*, 640.

See EMINENT DOMAIN, 2.

### CERTIFICATE.

See CORPORATIONS, 5; TAXES, 2, 3.

### CERTIORARI.

1. **HABEAS CORPUS.** — THE WRIT OF CERTIORARI may be issued by the supreme court of Montana to bring up for review, upon *habeas corpus*, the

proceedings of the district court relating to the conviction and sentence of the prisoner for alleged contempt of court. *In re MacKnight*, 451.

2. WRIT OF CERTIORARI IS PROPER WAY TO BRING CASE BEFORE SUPREME COURT WHEN. — Where a bill of exceptions would not show that the court-room was not crowded at the trial, that most of the seats provided for spectators were vacant, and that many different persons who showed themselves to be citizens of the state applied for admission and were refused, but these matters can all be properly raised and brought before the court by affidavit upon *certiorari*, the proper way in which to bring the case before the supreme court is by the writ of *certiorari*, and not by writ of error or bill of exceptions. *People v. Murray*, 294.

#### CHAMPERTY — MAINTENANCE.

1. PURCHASE OF RIGHT IN LITIGATION. — The purchase of a right which is or may become the subject-matter of a pending suit by one standing in no fiduciary relation does not constitute champerty, and is not unlawful unless made for the mere purpose of perpetuating strife and litigation; and it makes no difference that the consideration for the purchase is to be used in conducting the litigation and paying the expenses thereof. *Brown v. Bigné*, 752.
2. CONTRACT TO SUSTAIN LITIGATION. — A fair *bona fide* agreement by a layman to supply funds to carry on pending litigation, in consideration of having a share in the property in dispute if recovered, is not *per se* void, either on the ground of champerty or of public policy; but if such contract is made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, it is within the doctrine of champerty, and should not be enforced. *Brown v. Bigné*, 752.

#### CHARTERS.

See CORPORATIONS, 1; RAILROADS, 13, 14.

#### CHATTEL MORTGAGES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

#### CHECKS.

1. BANKS AND BANKING — CHECK AS APPROPRIATION OF FUND. — A check drawn upon an existing fund in bank is an absolute transfer or appropriation to the holder of the amount designated in the check, then in the hands of the drawee, and entitles the holder to sue the bank in his own name upon its refusal to pay. *Fonner v. Smith*, 510.
2. BANKS AND BANKING — CHECK AS APPROPRIATION OF FUND — DUTY OF BANK TO PAY — SUBROGATION. — A bank receives deposits on the express or implied promise to pay them out upon the checks of the depositor to any person in whose favor they may be drawn, to the extent of the deposit, and the check-holder is subrogated to the rights of the drawer in the deposit, to that extent is in privity, as assignee of the drawer, with the bank, and may sue it in his own name upon its refusal to pay the check. *Fonner v. Smith*, 510.
3. BANKS AND BANKING — RIGHT OF CHECK-HOLDER TO SUE BANK — WITHDRAWAL OF FUNDS. — The holder of a check drawn upon funds in bank and presented before such funds are withdrawn may sue the bank in his

own name for refusing to pay such check; and after notice to the bank of the drawing of such check, the fund thus appropriated cannot be withdrawn by the depositor. *Fonner v. Smith*, 510.

See PAYMENT.

## CHURCH CORPORATIONS.

See CEMETERIES.

## CLOUD ON TITLE.

1. **VENDOR AND VENDEE — QUIETING TITLE — PARTIES.** — A complaint in an action to quiet title, alleging that a certain decedent, whose wife had previously died, was at the time of his death the owner of one tract of land and had a homestead claim on another; that by his will he directed that the homestead title be perfected, and that all of his land should be sold when it would realize six thousand dollars, the proceeds to be divided equally amongst his minor children; that the executor named filed an inventory of the estate, including the homestead claim; that the guardian appointed for the minor heirs obtained a certificate of entry for the homestead; that thereafter the executor, under order of court, sold and conveyed all the land named in the inventory to plaintiff for \$6,050, the sale and conveyance being duly confirmed by the court; that thereafter two of said children, having become of age, conveyed their interest in all the land to plaintiff; that thereafter the guardian of the remaining children conveyed whatever interest they might have in the land to plaintiff under order of court; that said children received and retained their several portions of the purchase-money on becoming of age, and never asserted any claim to any of the land; that thereafter said children executed a quitclaim deed of their interest in the homestead tract to a third party, — states a cause of action as against the quitclaim grantee only, and should be dismissed on demurrer as against such children made parties defendant, but who are estopped to claim any interest in the land by the deed made by the executor. Under the facts of such complaint, judgment should be rendered in favor of plaintiff as against the quitclaim grantee. *Lewis v. Lichty*, 25.

2. **FRAUDULENT CONVEYANCES — EXECUTION — SALES — QUIETING TITLE — LIMITATIONS.** — An action to remove a cloud on title caused by a fraudulent conveyance is not an action for relief on the ground of fraud, and is not subject to the limitations imposed by statute on such actions. *Wagner v. Law*, 56.

See FRAUDULENT CONVEYANCES, 1-3.

## COODICIL.

See WILLS, 7.

## COLLATERAL ATTACK.

See ATTACHMENT, 2; CRIMINAL LAW, 12.

## COLLATERAL SECURITY.

See NEGOTIABLE INSTRUMENTS, 2.

## COLLUSION.

See JUDGMENTS, 5.

COMMERCE.

See INTERSTATE COMMERCE.

COMMISSIONS.

See BROKERS.

COMMON CARRIERS.

See CARRIERS.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 10.

COMPROMISE.

**RESCISSIO — RESTORATION, OFFER OF.** — In an equitable action to rescind a settlement or compromise, it is sufficient for the plaintiff to offer, in his complaint, to restore what he has received. After such offer, the rights of the parties will be regulated and protected in the final judgment. *Berry v. American etc. Ins. Co.*, 548.

See INSURANCE, 22.

CONFLICT OF LAWS.

See CONTRACTS, 1, 2; SALES, 1.

CONGRESS.

See INTERSTATE COMMERCE.

CONSTABLES.

See HOMICIDE, 1.

CONSTITUTIONAL LAW.

See ELECTIONS, 6, 7; EMINENT DOMAIN, 1; LEGISLATURE; MUNICIPAL CORPORATIONS, 9, 11; STATUTES.

CONSTITUTIONS.

**OFFICERS — QUALIFICATION — MANDATORY PROVISIONS.** — A constitutional provision that a person appointed to the office of state treasurer shall qualify by taking the constitutional oath of office within one month after his appointment, and that if he refuses or neglects to do so within that period of time, such refusal or neglect shall operate as a refusal to accept the office, and a new appointment must be made, is mandatory and not merely directory. *Archer v. State*, 261.

See CRIMINAL LAW, 4; ELECTIONS, 2-4, 6, 7; EMINENT DOMAIN, 1; OFFICERS, 2; STATUTES, 4; WATERCOURSES, 8.

CONSTRUCTION.

See DEVISE, 4.

CONTEMPT.

1. A CONTEMPT OF COURT is a willful disregard of its authority, and may consist of disorderly or insulting language or behavior in its presence tending to disturb its proceedings or impair the respect due to its authority. AM. ST. REP., VOL. XXVIII. — 62



or a disobedience of its rules or orders interfering with the due administration of law. *In re MacKnight*, 451.

2. **CONTEMPT OF COURT IS NOT COMMITTED BY THE REFUSAL OF THE PUBLISHER OF AN ARTICLE**, the publication of which is prosecuted as a contempt of court, to give the names of the persons making the comments referred to in such article. If the publication of the article was a contempt, relevant inquiry ceased when it was ascertained who was its author and publisher. *In re MacKnight*, 451.
3. **PUBLISHER OF A NEWSPAPER** is not liable to punishment as for a contempt of court because he publishes what purports to be the statements of third persons, to the effect that the public and the judge of a designated county, in which a cause was pending, were prejudiced; that the money involved in the cause had turned the head of every man in the county; that they had all voted for the judge because they knew his views, and that he could not be won over to any other; that there was money enough in the business to corrupt every corruptible man in the state; and that it had caused a deadly bias in the minds of men who could not be bought with money at all; and that neither the judge nor any jury that could be obtained in the county would render a decision according to the evidence. *In re MacKnight*, 451.

See CERTIORARI, 1.

#### CONTRACTS.

1. **ACCORDING TO WHAT LAW CONSTRUED.** — The law of the *situs* conclusively governs as to all questions relating to rights, titles, and interests in and to real estate, but a contract concerning personalty is usually construed according to the laws of the country with reference to which it was made. In so far, therefore, as an antenuptial contract made in France relates to personalty, it will be construed according to the law of France, but so far as it relates to real estate owned in Missouri at the time of the making of the contract, it will be construed by the law of Missouri. *Richardson v. De Giverville*, 426.
2. **CONFLICT OF LAWS.** — A CONTRACT VOID BY REASON OF THE LAWS OF THE STATE WHERE IT WAS MADE and is to be performed is generally void elsewhere. *Bank of Commerce v. Fuqua*, 461.
3. **PAYMENT — RESCISSION OF CONTRACT TO ADVANCE MONEY TO MAKE.** — Where a bank has contracted with the maker to advance money to pay a note, unknown to the payee, the bank may rescind the contract at any time before actual payment is made, on the ground that its consent to the contract was given by mistake. *Steinhart v. National Bank*, 132.
4. **PAYMENT — RESCISSION OF CONTRACT TO MAKE.** — Where a bank has contracted with the maker, unknown to the payee, to advance money to pay a note, and has rescinded the contract before payment, because of the assignment in insolvency of the maker on the same day, evidence that the assignment was made that day, and as to how long it took to prepare it, is admissible in an action by the payee to recover the amount of the note from the bank, when other evidence shows that on the morning of the same day the maker thought he was able to pay all his debts in the usual course of business. *Steinhart v. National Bank*, 132.

See ADVERSE POSSESSION, 5; AGENCY, 1; BROKERS; CHAMPERTY, 2; CORPORATIONS, 2; DEBTOR AND CREDITOR, 2; DEEDS; EVIDENCE, 1, 10; HUSBAND AND WIFE, 8, 11, 12; INSURANCE, 3, 4, 7, 8; INTEREST, 1; JUDGMENTS,

6; JURISDICTION, 1; LANDLORD AND TENANT, 1, 3; MINER AND MINING, 1, 3; MUNICIPAL CORPORATIONS, 12; PARTNERSHIP; PLRADING, 7, 10; SALES; STATUTES, 6; SURETYSHIP; WATER COMPANIES; VENDOR AND PURCHASER, 1, 2, 7, 8.

### CONTRIBUTORY NEGLIGENCE.

See CARRIERS, 3; RAILROADS, 11; TELEGRAPHS, 1.

### CONVERSION.

See Co-TENANCY, 2; EXECUTIONS, 7; TROVER.

### CONVEYANCES.

See BOUNDARIES; DEEDS; TRUSTS, 1.

### CORPORATIONS.

1. CORPORATION ACCEPTING A CHARTER CONSENTS to be bound by all of its provisions and conditions, and cannot complain of the enforcement of any, if, by a fair reading of the language, the enforcement in the particular manner is authorized. *Mayor v. Dry Dock etc. R. R. Co.*, 609.
2. STOCK SUBSCRIPTIONS—WAIVER OF DEFENSE BY ACQUIESCENCE. — If a subscriber for stock in a corporation makes his contract for subscription previous to and in anticipation of the incorporation, he waives the defense that the capital stock of the corporation has not been subscribed as provided for in his contract, by voluntarily acquiescing in the mode of incorporation with a full knowledge of the facts. *California etc. Hotel Co. v. Callender*, 99.
3. STOCK SUBSCRIPTIONS—FINDING OF WAIVER OF DEFENSE.— In an action by a corporation to recover upon a stock subscription, a finding that the subscriber has waived any right to object to the act or method of incorporation implies that he has a knowledge of the right waived, and that the waiver was voluntary. Nor is this conclusion affected by the fact that the court found certain probative facts insufficient in themselves to prove a waiver, and only tending in that direction. *California etc. Hotel Co. v. Callender*, 99.
4. STOCK SUBSCRIPTIONS—WAIVER OF DEFENSE. — A subscriber to stock in a corporation to be formed may waive any defense he may have to the subscription. Such waiver may be express, or implied from the acts or declarations of the subscriber. A payment of a call with full knowledge of the defense, or any act indicating a clear intent to abide by, accept, or pass over any defense held by the subscriber, will constitute a waiver. *California etc. Hotel Co. v. Callender*, 99.
5. STOCK—ISSUANCE OF CERTIFICATE. — It is not necessary to a subscriber's ownership of stock in a corporation that a certificate therefor should have been issued to him, nor is the corporation bound to issue such certificate until the subscription price is fully paid. The corporation may allege the subscriber's ownership of the stock, and recover on the contract of subscription, before issuing a certificate of the stock to him. *California etc. Hotel Co. v. Callender*, 99.
6. CALL FOR UNPAID STOCK SUBSCRIPTION NOT NECESSARY WHEN. — A call for unpaid stock subscription is not necessary, where the creditor takes out execution therefor after judgment obtained and execution returned *nulla bona*, nor where the creditor brings his suit directly against the stock-

- holder, under the section of the statute which gives him a direct action against a stockholder in case of a dissolution of the corporation. *Washington Sav. Bank v. Butchers' etc. Bank*, 405.
7. **STOCKHOLDER'S LIABILITY ON UNPAID STOCK OF CORPORATION DOES NOT MATURE UNTIL CALL MADE.** — As between a corporation and its stockholder, the latter's liability on his unpaid stock does not mature until a call is made, and it is then that the statute begins to run. Where the officers of a corporation, whose affairs are in the hands of a court, have neglected to make the call, the court may make the call in the interest of the creditors, though the stockholders are not made parties to the suit, and the receiver or other officer of the court may collect the unpaid stock subscriptions by suits at law against the stockholders, and in such cases the cause of action does not accrue, nor the statute of limitations begin to run, until a call or some authorized demand is made. *Washington Sav. Bank v. Butchers' etc. Bank*, 405.
  8. **STOCK — LIABILITY FOR CALLS.** — When, by a contract of subscription, a subscriber to stock in a corporation agrees to pay upon the call of the directors, at such time and in such manner as may be determined by them, it is not necessary to a recovery on the contract that such directors should have levied assessments on the stock in the mode prescribed by the statute. *California etc. Hotel Co. v. Callender*, 99.
  9. **JUDGMENT CREDITOR MAY HAVE EXECUTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION WHEN.** — Where an execution has been issued on a judgment against a corporation and returned unsatisfied, the judgment creditor may, under the Missouri statute, have execution against a stockholder to the extent of the unpaid balance of his stock. In such a case the cause of action does not accrue in favor of the creditor and against the stockholder until judgment is obtained and execution returned *nulla bona*, and the statute of limitations, for all the purposes of the proceeding, commences to run from that date. *Washington Sav. Bank v. Butchers' etc. Bank*, 405.
  10. **CREDITORS OF A CORPORATION HAVE AN EQUITABLE LIEN UPON ITS ASSETS,** both as against stockholders and all transferees except those purchasing in good faith and for value, and a transferee who accepts an assignment of all the assets of a corporation, in consideration of his agreement to assume the payment of its debts, is not such a purchaser. *Cole v. Millerton Iron Co.*, 615.
  11. **NOTICE OF MEETINGS — TRANSACTIONS OF ILLEGAL MEETING AS EVIDENCE.** — It is indispensable, to a legal meeting of the directors of a corporation for the transaction of business, that all the directors have notice, either actual or constructive, of the time and place of the meeting, unless they are all actually present thereat. The transactions of any meeting not so held are void, and evidence of such transactions are inadmissible upon a direct attack. *Doernbecher v. Columbia City Lumber Co.*, 766.
  12. **NOTICE OF MEETING. — AN ASSIGNMENT** of the property of a corporation, made by a majority of its directors, at a meeting held without notice, actual or constructive, to all the directors of the time and place of such meeting, and in the absence of some of the directors, is void. *Doernbecher v. Columbia City Lumber Co.*, 766.
  13. **OFFICERS — NOTICE.** — Knowledge acquired by an officer of a corporation, in a transaction in which he acts for himself alone and for his own private interests, will not bind the corporation in a subsequent transaction involving the same subject between himself and the corporation as

a private individual, unless the knowledge was previously communicated to the corporation. *Koehler v. Dodge*, 518.

14. CORPORATION MAY RATIFY UNAUTHORIZED ACTS OF ITS AGENTS. — A corporation may ratify the unauthorized acts of its agents without such ratification being evidenced by a vote or formal resolution of the board of directors, and when such unauthorized acts are clearly beneficial to the corporation, a presumption of ratification will arise from slight circumstances. *Washington Sav. Bank v. Butchers' etc. Bank*, 405.
  15. INSOLVENCY. — TRANSFER BY A CORPORATION IS IN CONTEMPLATION OF INSOLVENCY, though it had never refused payment of any of its obligations, if the transfer is of all its assets in consideration of an agreement of the transferee to assume the payment of its debts, and the necessary result of the transfer was to render the corporation unable to make such payment itself. *Cole v. Millerton Iron Co.*, 615.
- See APPEAL, 6; CEMETERIES; CREDITOR'S SUIT; DEBTOR AND CREDITOR, 1; ESTOPPEL, 2; FRAUDULENT CONVEYANCES, 4; LIMITATIONS OF ACTIONS; TRIAL, 1; WATER COMPANIES.

#### CORPSES.

1. BURIAL RIGHTS. — WHILE THERE IS NO PROPERTY IN THE DEAD BODY of a human being, in the commercial sense of the term, yet those who are entitled to its possession and custody for the purpose of burial have legal rights in it which the law recognizes and protects, and any interference with such rights is an actionable wrong. *Larson v. Chase*, 370.
2. BURIAL RIGHTS. — A WIDOW HAS THE RIGHT TO THE CUSTODY OF THE BODY OF HER DECEASED HUSBAND for the purpose of preservation, preparation, and burial, and may maintain an action against any one who mutilates or destroys it. *Larson v. Chase*, 370.

#### COSTS.

See JUDGMENTS, 2.

#### CO-TENANCY.

1. WASTE. — NEITHER A GRANTEE NOR A MORTGAGEE OF A TENANT IN COMMON is entitled to an injunction to prevent another co-tenant from carrying on the business of making brick upon and out of the lands of the co-tenancy, where works had been constructed upon such land for the carrying on of such business, and the business itself undertaken before such grant or mortgage was executed. *Russell v. Merchants' Bank*, 368.
  2. INTERESTS OF CO-TENANTS IN PROFITS OF LAND DESCENDIBLE TO HEIRS UNTIL CONVERSION. — Co-tenants of land may agree that the profits, either before or after a sale of the land, shall be equally divided, subject to any charges that they may impose upon their respective interests; but until there has been a conversion, either legal or equitable, their interests retain the characteristics of real property, and as such is descendible to their heirs. *Maxwell v. Barringer*, 668.
- See LIMITATIONS OF ACTIONS, 2; MINER AND MINING, 1, 3; MORTGAGES, 4.

#### COUNSEL.

See APPEAL, 8.

## COURSES AND DISTANCES.

See BOUNDARIES, 1.

## COURTS.

1. **STARE DECISIS.** — The doctrine of *stare decisis* does not apply where it can be shown that the law has been misunderstood or misapplied, nor where the former decision is evidently contrary to reason. Hasty or crude decisions should be examined without fear and reversed without reluctance. *Rumsey v. New York etc. Ry Co.*, 600.
  2. **PER CURIAM OPINIONS, WEIGHT OF.** — A *PER CURIAM* opinion is an opinion of the court in which all the judges are of one mind, and so clear that they do not deem it necessary to elaborate it by an extended discussion. It is of as much weight and authority as any other opinion. *Clarke v. Western Assur. Co.*, 821.
- See OBTORTARI, 1; CONTEMPT; CRIMINAL LAW, 12; EQUITY, 1; EVIDENCE, 5; EXECUTION, 2; EXECUTORS AND ADMINISTRATORS, 1; FRAUD; JUDGMENTS, 8; JUDICIAL SALES; JURISDICTION; STATUTES, 1; TRIAL.

## COVENANTS.

**RELEASE FROM RESTRICTIVE COVENANTS IN A DEED SHOULD BE DECREED** to be executed when a judgment is entered awarding plaintiff damages for the permanent injuries sustained by him by reason of the breach of such covenants. *Amerman v. Deane*, 584.

See DAMAGES, 13; INJUNCTION, 1, 5; LANDLORD AND TENANT, 1, 10; PUBLIC LANDS, 1; SPECIFIC PERFORMANCE.

## CREDITOR'S SUIT.

**CREDITORS' BILL MAINTAINABLE AGAINST STOCKHOLDERS WHO HAVE NOT PAID UP THEIR SUBSCRIPTIONS WHEN.** — In equity, a creditors' bill may be maintained by the creditors of a corporation against stockholders who have not paid up their stock subscriptions, notwithstanding the statute furnishes other remedies to the creditors; and in such a suit it is no defense that the stock is payable upon call of the board of directors, and that no call has been made. *Washington Sav. Bank v. Butchers' etc. Bank*, 405.

## CRIMINAL LAW.

1. **SOLICITATION TO COMMIT FELONY IS INDICTABLE OFFENSE AT COMMON LAW.** — The solicitation to commit murder, accompanied by an offer of money as a reward for its commission, is an indictable offense at common law. *Commonwealth v. Randolph*, 782.
2. **ATTEMPT TO COMMIT FELONY.** — Soliciting another to commit a felony, accompanied by an offer of a reward, and the furnishing the means to the party solicited of committing the proposed felony, makes the crime of attempting to commit a felony complete and indictable. *State v. Bowers*, 847.
3. **ATTEMPT TO COMMIT ARSON.** — Soliciting another to commit arson, accompanied with an offer of reward to do so, and furnishing the party solicited with matches for that purpose, is an indictable attempt to commit a felony. *State v. Bowers*, 847.
4. **PUBLIC TRIAL.—RIGHT OF ACCUSED TO HAVE.** — A person accused of crime has, by the constitution and laws of Michigan, a right to a public

trial, and an order made by the trial court in a criminal case directing an officer to stand at the door of the court-room, "and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in when they shall apply," violates the legal and constitutional right of the accused to a public trial, although there were private entrances to the court-room, through which persons who wished to do so might gain admission. *People v. Murray*, 294.

5. **FORMER ACQUITTAL, PLEA OF, PROOF NECESSARY TO ESTABLISH.** — In order to establish and make good a plea of former acquittal, the defendant must show that he has been acquitted of the accusation against him in the case on trial, not of an entirely different offense growing out of the same transaction. *Hooper v. State*, 928.
6. **FORMER JEOPARDY, PLEA OF, NOT AVAILABLE TO ACCUSED WHEN.** — Where a conviction and judgment are set aside on proceedings instituted by a prisoner, on the ground that he has been deprived of a public trial, the plea of former jeopardy cannot avail to prevent a second trial. *People v. Murray*, 294.
7. **PLEA OF AUTREFOIS ACQUIT** is not sustained by proof that the accused, who is under indictment for larceny, was previously indicted for burglary, and on his trial finally acquitted, and that at such trial the testimony relied upon to convict him tended to prove that at the time and place of the alleged burglary he stole the property described in the indictment for larceny. *State v. Hackett*, 380.
8. **FORMER JEOPARDY — DISMISSAL OF MINOR CHARGE AFTER TRIAL AND BEFORE JUDGMENT.** — When a defendant is tried upon a charge of petit larceny by a court of competent jurisdiction, and upon the conclusion of the evidence, the court, believing that another crime has been committed, refuses to render judgment, and dismisses the charge of its own motion, the defendant has been placed in jeopardy, and the proceedings are a bar to a subsequent prosecution against him for grand larceny upon the same facts. *People v. Ny Sam Chung*, 129.
9. **FORMER JEOPARDY. — CONVICTION OR ACQUITTAL OF MINOR OFFENSE** is a bar to a prosecution for the same act charged as a higher offense, whenever the defendant on trial of the latter might be legally convicted of the former had there been no other prosecution. *People v. Ny Sam Chung*, 129.
10. **FORMER JEOPARDY NOT AFFECTED BY ERROR.** — Where jeopardy has attached, the defendant cannot be deprived of the benefit of such jeopardy by the refusal of the court to proceed to render judgment, and its dismissal of the charge, even though the court is aware that by reason of an error of law committed on the trial, or by reason of the insufficiency of the evidence to support the charge, a mistrial will be the necessary result. *People v. Ny Sam Chung*, 129.
11. **FORMER JEOPARDY — VOIDABLE JUDGMENT.** — Under a voidable judgment of conviction the defendant is in jeopardy, and such judgment is a bar to further prosecution on the same facts for the same or a higher offense necessarily including the former, until such judgment is reversed or set aside. *People v. Ny Sam Chung*, 129.
12. **JUDGMENT OF ACQUITTAL CANNOT BE COLLATERALLY ATTACKED AND TREATED AS VOID** on the ground that it was procured by bribing the prosecuting attorney, and thereby causing him to go to trial without making any effort to procure the attendance of witnesses by whom defendant's guilt could have been proved, and to submit the cause to the court

sitting without a jury, and without offering any evidence except the statement of the accused and *ex parte* affidavits produced in his behalf *Shideler v. State*, 206.

See APPEAL, 4, 8; BURGLARY; FORGERY; GAMING; HABEAS CORPUS; HOMICIDE; INDICTMENT; JUDGMENTS, 9; JURISDICTION, 2; LARCENY; MALICIOUS PROSECUTION; NEW TRIAL; SLANDER, 1, 2, 4; TRIAL, 6; WITNESSES, 1.

### CROSS-EXAMINATION.

See WITNESSES, 4.

### CUSTOM.

See RAILROADS, 1.

### DAMAGES.

1. DAMAGES RECOVERABLE FOR CUTTING OFF ACCESS FROM PLAINTIFF'S LAND TO A RIVER in front thereof cannot exceed the diminution of the rental or usable value of the property in the condition in which it was during the time for which recovery was sought. The plaintiff cannot recover for damages which he might have sustained if he had put the property to some other use or placed structures upon it. *Rumsey v. New York etc. R'y Co.*, 600.
2. DAMAGES FOR CUTTING OFF ACCESS FROM PLAINTIFF'S LAND TO A RIVER IN FRONT THEREOF may be ascertained by establishing the rental value with such access unaffected, and deducting therefrom the rental or usable value after such access was cut off. *Rumsey v. New York etc. R'y Co.*, 600.
3. DAMAGES RESULTING FROM THE DESTRUCTION OF FRUIT-TREES by fire, where their owner is not satisfied to accept their value after separated from the realty, are to be ascertained by deducting the value of the land after the fire from the value of the land before the fire. Therefore, it is error to permit a witness, against objection, to answer the question, "What were those trees worth before they were killed?" *Dwight v. Elmira etc. R. R. Co.*, 563.
4. VALUE OF FRUIT-TREES cannot be accurately measured without reference to the soil on which they stand, and therefore, when damages are sought to be recovered for their destruction, the question is not, what were they worth disconnected from the soil, but, how much has the value of the realty been depreciated by such destruction. *Dwight v. Elmira etc. R. R. Co.*, 563.
5. WHEN FOREST TREES grown to maturity, or nursery trees intended for marketing, are cut down or otherwise destroyed, the measure of damages is their value separated from the soil, but even in the case of full-grown trees, their owner may recover damages to his land, consisting of the difference in value of the land before and after their cutting or other destruction. *Dwight v. Elmira etc. R. R. Co.*, 563.
6. MENTAL SUFFERING IS A PROPER ELEMENT OF DAMAGE when it is one of the direct, proximate, and natural consequences of an actionable wrong. *Larson v. Chase*, 370.
7. BURIAL RIGHTS. — Damages are recoverable from one who mutilates or destroys a human body, and mental suffering is an element of such damages when it is the direct, proximate, and natural result of the wrongful act. *Larson v. Chase*, 370.

8. **ACTUAL AND EXEMPLARY.** — When a cause of action is for exemplary damages, such damages, and none other, can be recovered; and when the cause of action is for actual damages, only such damages can be recovered. *Spellman v. Richmond etc. R. R. Co.*, 858.
9. **EXEMPLARY DAMAGES ARE AWARDED** as compensation to the plaintiff for the wrong done him, and at the same time as a punishment for the tortfeasor. *Samuels v. Richmond etc. R. R. Co.*, 883.
10. **EXEMPLARY, WHEN MAY BE RECOVERED, AND HOW PLEADED.** — A tort that sounds in exemplary damages exists when some right or property of a person, natural or artificial, is invaded maliciously, violently, wantonly, or with reckless disregard of social or civil obligations. To entitle a plaintiff to recover such damages, he must allege and prove the distinctive elements of such a tort. *Samuels v. Richmond etc. R. R. Co.*, 883.
11. **EXEMPLARY, WHEN ALLOWED.** — Exemplary damages are given by way of punishment for the wrong inflicted, and are not allowed for mere negligence, but only in cases where the wrong is wantonly and willfully inflicted, or with such a gross want of care and regard for the rights of others as to justify the presumption of wantonness or willfulness. Actual malice need not exist or be proved to entitle the party wronged to exemplary damages. *Spellman v. Richmond etc. R. R. Co.*, 858.
12. **EXEMPLARY, WHEN MAY BE RECOVERED.** — When a cause of action is an invasion of the rights or property of a person, natural or artificial, characterized by violence, fraud, malice, wantonness, or a reckless disregard of social or civil rights, exemplary damages may be recovered. *Spellman v. Richmond etc. R. R. Co.*, 858.
13. **DAMAGES FOR THE ERECTION OF A TENEMENT-HOUSE** in violation of a restrictive covenant need not be limited to those suffered at and before the commencement of the suit, but may be estimated upon the theory that such house will be permanently used as a tenement-house, where it is a permanent structure especially erected for continued use as a flat or tenement-house. As its use as such is lawful, there is no presumption that it will be discontinued. *Amerman v. Deane*, 584.
- See **AGENCY**, 4; **ANIMALS**, 1, 5; **APPEAL**, 6; **CARRIERS**, 1, 2; **COVENANTS**; **EMINENT DOMAIN**, 1; **HUSBAND AND WIFE**, 2; **INSURANCE**, 3, 4; **JURISDICTION**, 1; **LANDLORD AND TENANT**; **MARRIAGE AND DIVORCE**; **MUNICIPAL CORPORATIONS**, 13; **NEGLIGENCE**; **PLEADING**, 3, 9; **RAILROADS**, 1-4; **SALES**, 2; **SHIPS AND SHIPPING**; **SLANDER**, 6-8; **TELEPHONES**, 3, 4; **TRIAL**, 3-5; **WATERCOURSES**, 6, 7, 16.

## DEAD BODIES.

See **CORPSES**.

## DEBTOR AND CREDITOR.

1. **CREDITORS CANNOT BE FORCED TO SUBMIT TO A CHANGE OF DEBTORS**, and therefore a transfer of one corporation to another, in consideration of the latter's assumption of the debts of the former, is illegal as against its debtor, and cannot be upheld as against him on the ground that the stockholders and officers of the two corporations are the same, and his remedy against the transferee is as ample as it would have been against the transferor had no transfer been made. *Cole v. Millerton Iron Co.*, 615.
2. **SUBROGATION.** — **THE RIGHT OF SUBROGATION DOES NOT DEPEND UPON NOR**



GROW OUT of the ability of the parties to make valid contracts, and is not founded upon contract, express or implied, but upon principles of equity and justice intended to afford protection to the meritorious creditor, and to prevent the sweeping away of the fund from which in good conscience he ought to be paid. *Spaulding v. Harvey*, 176.

3. SUBROGATION — INSOLVENCY. — The right to be subrogated to the securities of one who has been paid does not depend upon the solvency or insolvency of the debtor, but upon the circumstances attending the payment of the debt to which the security was incident. *Spaulding v. Harvey*, 176.

See APPEAL, 13; ASSIGNMENT, 5; ATTACHMENT, 1; CORPORATIONS, 10; CREDITOR'S SUIT; FRAUDULENT CONVEYANCES, 4; INSOLVENCY; LEGACIES; LIMITATIONS OF ACTIONS, 4; MORTGAGES, 5; SURETYSHIP.

#### DECLARATIONS.

See CORPORATIONS, 4; EVIDENCE, 7, 8; WITNESSES, 2.

#### DEED OF TRUST.

See JUDGMENTS, 3.

#### DEEDS.

EXECUTION OF, IN BLANK. — When a deed is executed and acknowledged by the grantor, with a blank left therein for the name of the grantees, the grantor may, by parol, authorize a third person to insert the name of such grantees, and when so filled out and delivered, it becomes a valid deed. *Oribben v. Deal*, 746.

See ADVERSE POSSESSION, 3; AUCTIONS, 3; COVENANTS; DEVISE, 4; ESTATE, 1, 2; GRANTS; HUSBAND AND WIFE, 9, 12; TRUSTS, 2; WATER-COURSES, 2.

#### DEFINITIONS.

"An act to establish a probate court." *Johnson v. Harrison*, 382.

"And to their heirs, share and share alike." *L'Eclouneau v. Henquenet*, 310.

*Animus testandi.* *Barney v. Hayes*, 495.

"Appurtenances." *Simmons v. Winters*, 727.

"Charged in error." *Steinhart v. National Bank*, 132.

"Canceled in error." *Steinhart v. National Bank*, 132.

Contempt of court. *In re MacKnight*, 451.

"Damaged." *Van De Vere v. Kansas City*, 396.

"Domesticated animal." *Hurley v. State*, 916.

Double insurance. *Clarke v. Western Assur. Co.*, 821.

Eminent domain. *Matter of Board of Street Opening*, 640.

"Examining court." *Childers v. State*, 899.

"Examining trial." *Childers v. State*, 899.

"Execution." *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 118.

Express malice. *Martinez v. State*, 895.

"For the sole use of his wife, if living, and if not living, to her children or their guardian." *Walsh v. Mutual Life Ins. Co.*, 651.

"From a broad and sensible point of view, and liberal, because it is not a case to cut off corners too closely." *Steinbrunner v. Pittsburgh etc. Ry Co.*, 806.

Gaming-table. *Lyle v. State*, 893.

Implied malice. *Martinez v. State*, 895.

- In custodia legis.* *Oppenheimer v. Marr*, 539.  
*Insurable interest.* *Berry v. American etc. Ins. Co.*, 543.  
*Locus penitentiae.* *Braun v. Keally*, 811.  
*Malice.* *Martinez v. State*, 895.  
 "More or less." *Kennedy v. Boykin*, 838.  
 "More or less" and "about." *Oakes v. De Lancey*, 628.  
 "Necessaries." *Bergh v. Warner*, 362.  
*Nuisance per se.* *Van De Vere v. Kansas City*, 396.  
*Nulla bona.* *Dornin v. McCandless*, 798.  
 "Parties." *Ashon v. Rochester*, 619.  
*Per curiam.* *Clarke v. Western Assur. Co.*, 821.  
*Pro tanto.* *McDaniel v. Maxwell*, 740.  
*Scire facias quare restitutionem habere non debet.* *Haebler v. Myers*, 538.  
*Stare decisis.* *Rumsey v. New York etc. Ry Co.*, 600.  
 "Sticker." *De Walt v. Bartley*, 814.  
 "Surgery." *Allan v. State S. S. Co.*, 556.  
 "That the defendant be restored to all things which he has lost on occasion of the judgment aforesaid." *Haebler v. Myers*, 539.  
 "Thence running along said shore and sound as the same bend and turn." *Oakes v. De Lancey*, 628.  
*Watercourse.* *Simmons v. Winters*, 727.  
 "What were those trees worth before they were killed?" *Dwight v. Miners etc. R. R. Co.*, 563.  
*Will.* *Barney v. Hayes*, 495.  
 "Writ." *Southern Oak Lumber Co. v. Ocean Beach Hotel Co.*, 115.

#### DESCENT.

1. **FATHER, WHEN HEIR TO CHILD.** — When a child dies a natural death, without issue, and possessed of an estate descended to him or her from the mother, the father will take such estate by inheritance. *Shellenberger v. Ransom*, 500.
2. **DECEDENT MURDERED BY HEIR.** — A person cannot take by inheritance the estate of a person whom he murders for the purpose of removing the life that stands between him and such estate. *Shellenberger v. Ransom*, 500.
3. **DECEDENT MURDERED BY HEIR — PURCHASER FROM MURDERER.** — A purchaser from a father who has willfully murdered his child for the purpose of inheriting her estate acquires no interest in such estate. *Shellenberger v. Ransom*, 500.

See CO-TENANCY, 2; WILLS, 8.

#### DEVISE.

1. **WILLS — EXECUTORY DEVISE — REMAINDER.** — A disposition of property by will is never construed as an executory devise when it is possible to give it effect as a remainder. *Watson v. Smith*, 665.
2. **WILLS — CONCURRENT CONTINGENT REMAINDERS.** — When property is devised to one for life, and at his death to his issue then living, or in default of such issue to a third person, concurrent contingent remainders are created for the use of such issue and such third person, the latter limitation to take effect only on the failure of the former to vest. *Watson v. Smith*, 665.
3. **WILLS — CONTINGENT ESTATES.** — WHERE THERE IS A SUBSTITUTED DEVISE to take effect in case any of a class die during a precedent estate,

the remainder is then vested in the existing members, subject to open and let in new members, and to be wholly divested in favor of a substituted devisee as to the share of a member dying. *L'Etoile v. Henguet*, 310.

4. **WILLS — CONSTRUCTION — HOMESTEAD — ELECTION BY HEIRS — ESTOPPEL.** — When a testator by his will directed that his homestead claim to land be perfected, and that all of his real estate be sold when it would realize a certain sum, the proceeds to be equally divided among his children, it will be presumed that he did not attempt to dispose of the homestead claim by his will, and his children were not required to make any election, but could have claimed the homestead as his heirs, and also shared in the estate under the will. As the executor named included the homestead in the inventory of the estate, and sold and conveyed it with the rest of the testator's land under order of court which was confirmed, and the purchaser thereafter obtained a quitclaim deed thereto from the testator's children who had come of age, and from the guardian of his minor children, after which such children, on coming of age, received and retained their respective portions of the purchase-money received at the executor's sale, they are estopped from denying that their title to any of the land, including the homestead, passed by the executor's deed. *Lewis v. Lichty*, 25.

See ASSIGNMENT, 6; LEGACIES.

#### DISCRIMINATION.

See CARRIERS, 1, 2; JURISDICTION, 1; MUNICIPAL CORPORATIONS, 2, 10.

#### DISSOLUTION.

See CORPORATIONS, 6.

#### DISTRIBUTION.

See DESCENT.

#### DIVERSION.

See WATERCOURSES, 6, 12.

#### DOCK LINES.

See WATERCOURSES, 17.

#### DOGS.

See ANIMALS; LARCENY.

#### DOMICILE.

See ELECTIONS, 2, 3.

#### DOWER.

See ADVERSE POSSESSION, 5; HUSBAND AND WIFE, 14; PUBLIC LANDS, 2.

#### DRUGGISTS.

See APOTHECARIES.

#### DUE PROCESS OF LAW.

See MUNICIPAL CORPORATIONS, 4; WATERCOURSES, 8.

## EASEMENTS.

1. **EASEMENT OR SERVITUDE, PROPERTY PASSES SUBJECT TO, WHEN.** — Where a continuous and apparent easement or servitude is imposed by the owner of real estate on a part thereof for the benefit of another part, and the portions are subsequently conveyed to different persons, the purchaser of the servient property, in the absence of an express reservation or agreement, takes it subject to the easement or servitude. *Gable v. Smith*, 796.
2. **RIGHT OF MILL-OWNER TO RESTORE DAM.** — When the owner of a mill and of the land sustaining a dam which supplies the water-power for the mill grants the mill, together with the mill seat and all water rights appertaining thereto, the grantee has a right to restore the dam afterwards washed away by freshet, although the land on which it is situated has been conveyed to other parties. In restoring the dam, he may connect it with the bank higher up the stream than it was formerly, if this is rendered necessary by the freshet; and he may build the restored dam higher than the old one, so long as he does not thereby increase the water-power to which he was entitled at the time of his grant, although the effect of such restoration is to overflow more than formerly the land on which the dam is situated. *Riverdale Park Co. v. Westcott*, 249.
3. **RIGHT OF MILL-OWNER TO REBUILD DAM — IMPROVED MACHINERY.** — When the owner of a mill, mill site, and the water rights thereto appertaining is entitled to rebuild a dam for furnishing him with power, situated on the land of another, his right to restore the dam to its original power is not affected by the introduction of new and improved machinery in the mill, so long as the quantity of water used is not thereby increased. *Riverdale Park Co. v. Westcott*, 249.
4. **EXTINGUISHMENT.** — When the purpose, reason, and necessity for an easement cease, within the intent for which it was granted, the easement is extinguished. *Hahn v. Baker Lodge*, 723.

See EMINENT DOMAIN, 1; GRANTS; INJUNCTION, 4; PRIVATE WAYS, 1.

## ELECTIONS.

1. **QUALIFICATION OF VOTER — VESTED RIGHTS — RULE OF EVIDENCE — REGISTRATION.** — The right of an elector to have his qualifications to vote determined by existing rules of evidence is not a vested right, and is at all times subject to regulation by statute, so long as his constitutional rights are not thereby invaded, and he is not precluded from presenting them to the proper forum for determination. The forum for the determination of this question is the office of registration of voters. *Southerland v. Norris*, 255.
2. **QUALIFICATION OF VOTER — RESIDENCE — RULE OF EVIDENCE.** — Whether or not a person is entitled to vote in a particular place where he is not actually domiciled is a question depending to some extent upon his intention to make that place his legal residence, and a statute which adds no qualification of any kind, but simply makes provision for proving in a particular and definite way what that intention is, invades no constitutional rights and is valid. *Southerland v. Norris*, 255.
3. **QUALIFICATION OF VOTER — RULE OF EVIDENCE AS TO RESIDENCE.** — A statute which adds no qualification to a voter except to provide that all persons whose names are registered, but who have removed from the

state and have acquired a new domicile elsewhere at the time of the passage of the act, shall be conclusively presumed to have permanently removed from the state, unless the person who has so removed rebuts that presumption by making a prescribed affidavit of intention to return and permanently reside within the state, and by subsequently returning, simply provides a rule of evidence for the proof of legal residence, and invades no constitutional nor legal right of a voter who has removed from the state previous to its enactment, and who is in the employ of the United States government in another state or country. *Southerland v. Norris*, 255.

4. **QUALIFICATION OF VOTER. — STATUTORY RULE OF EVIDENCE** in force at the time a voter's qualifications as an elector is to be decided or determined, and not that in force when that question first arose, must control the admissibility and effect of evidence applicable thereto, when no constitutional or legal right of the voter is invaded. *Southerland v. Norris*, 255.
5. **"STICKER" MAY BE USED TO PLACE CANDIDATE'S NAME ON BALLOT. —** Under the ballot act of June 19, 1891, the name of any candidate not printed on the ballot may be inserted therein by the voter by the use of a printed adhesive slip, and need not be written. *De Walt v. Bartley*, 814.
6. **CONSTITUTIONAL LAW — BALLOT LAW — ELECTIONS, POWER OF LEGISLATURE TO REGULATE. —** The legislature has undoubted power under the constitution to regulate elections so long as it merely regulates the exercise of the elective franchise, and does not deny the franchise itself, either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial. *De Walt v. Bartley*, 814.
7. **BALLOT ACT OF JUNE 19, 1891, NOT UNCONSTITUTIONAL. —** The act of June 19, 1891, prescribing and regulating the use of an official ballot, does not contravene the constitution. Its main object is to secure a secret ballot, and it prescribes reasonable regulations to effect its object, carefully preserving the right of every elector to vote for whom he pleases, without any unnecessary inconvenience. It is in harmony with the constitutional requirement that elections shall be free and equal, and is not local or special legislation. *De Walt v. Bartley*, 814.

See *DEVISM*, 4; *LANDLORD AND TENANT*, 5, 6.

#### EMINENT DOMAIN.

1. **CONSTITUTIONAL LAW — PROPERTY NOT "DAMAGED" WITHIN MEANING OF CONSTITUTION UNLESS IT IS SPECIALLY AFFECTED. —** The owner of property, to be entitled to compensation for property damaged by a public improvement, must show that either the property itself or some right or easement connected with it is directly affected, and that it is specially affected in a manner not common to the property owner and the public at large. The owner of a city lot cannot, therefore, enjoin the city from erecting a fire-engine house upon an adjacent lot until compensation is first made to him for the anticipated depreciation in the value of his property, in consequence of the noise and bustle incident to such a structure, where no special and peculiar damage is shown. *Van De Vore v. Kansas City*, 396.
2. **WHAT SUBJECT TO — CEMETERIES. —** The fact that lands have been previously devoted to cemetery purposes does not place them beyond the reach of the power of eminent domain. That is an absolute transcend-

ent power belonging to the sovereign, which can be exercised for the public welfare whenever the sovereign authority determines that necessity for its exercise exists, and the dwellings of the living and the resting-places of the dead may be alike condemned. *Matter of Board of Street Opening*, 640.

See WATERCOURSES, 8.

#### EMPLOYMENT.

See INVENTIONS.

#### ENTICEMENT.

See HUSBAND AND WIFE, 5.

#### EN VENTRE SA MERE.

See NEGLIGENCE, 4.

#### EQUITY.

1. **JURY TRIAL.** — IN A SUIT IN EQUITY, where there is a finding of facts by a jury and also by the court, the latter is as conclusive as if no jury had been impaneled in the case. *Harris v. Lloyd*, 475.
  2. **MUNICIPAL CORPORATIONS** — UNCONSTITUTIONAL TAX FOR STREET IMPROVEMENT — JURISDICTION OF EQUITY TO SET ASIDE WITHOUT TENDER. — Where a tax levied for a street improvement is void and unconstitutional for want of equality, a court of equity will set it aside and restrain its collection, at the instance of a land-owner against whom it is assessed without a tender on his part of his proper proportion of the cost of the improvement. *Howell v. Tacoma*, 83.
  3. **FINAL JUDGMENTS IN EQUITY, WHAT ARE.** — If, after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, it is final; otherwise it is interlocutory. *Arnold v. Sinclair*, 489.
  4. **A JUDGMENT IN EQUITY IS FINAL** which determines that plaintiff and defendant were partners; that the partnership has been dissolved; that the profits and losses were to be shared equally between the partners; that the assets of the partnership are in the possession of the defendant, and requires him to account to plaintiff touching the affairs of and business of the copartnership, and appoints a receiver to take possession of the property and do such acts respecting it as the court may authorize, and to close up the business, and directs that a referee be appointed to state an account between the partners and report it to the court, and that the residue of the property be divided between them. *Arnold v. Sinclair*, 489.
- See ASSIGNMENT, 2-5; COMPROMISE; EXECUTORS AND ADMINISTRATORS, 3; HUSBAND AND WIFE, 9; INJUNCTION, 5; JUDGMENTS, 7; MINES AND MINING, 3; MISTAKE; MORTGAGES, 4, 5; PUBLIC LANDS, 2; VENDOR AND PURCHASER, 4.

#### ERROR.

See APPEAL; CRIMINAL LAW, 10; DAMAGES, 3; EXECUTION, 1; HOMICIDE, 1, 4; SLANDER, 6; TRIAL, 6; WATERCOURSES, 16.

## ESTATES.

1. A VESTED ESTATE, whether present or future, may be absolutely or defeasibly vested. In the latter case, it is said to be vested subject to being divested on the happening of a contingency subsequent. *L'Etourneau v. Henquenel*, 310.
  2. REMAINDERS ARE CONTINGENT under the statute of Michigan if either the person to whom the estate is given or the event upon which it is to take effect remains uncertain. *L'Etourneau v. Henquenel*, 310.
- See DESCENT; DEVISE, 3; MORTGAGES, 3; STATUTES, 4; WILLS, 10.

## ESTOPPEL.

1. VENDOR AND VENDEE — ESTOPPEL AGAINST GRANTOR. — A deed of a grantor purporting to convey the absolute title to land estops him from denying that before and at the date of the deed he had such absolute title, and by the deed conveyed it to the grantee. *De Frieze v. Quint*, 151.
  2. GRANTOR OF LAND ESTOPPED BY HIS DEED TO CORPORATION WHEN. — Where a grantor, for a valuable consideration and in good faith, conveys land, by a deed which is duly recorded, to a corporation named therein as grantee, such grantor and those claiming under him will be estopped to deny the capacity of such grantee to take the land, although, owing to a mistake of the attorney, the incorporation of the grantee was not perfected until after the conveyance was made. *Reinhard v. Virginia etc. Mining Company*, 441.
  3. OWNER OF JUDGMENT ESTOPPED FROM DENYING DEFENDANT'S TITLE TO PROPERTY SOLD UNDER EXECUTION ISSUED ON. — Where the real owner of a judgment rendered in the name of another as the plaintiff on the record has execution issued and property sold under it as the property of the judgment defendant, he will be thereby estopped from afterwards setting up that such defendant had no title to the property when it was sold. *Rapp v. Crawford*, 780.
  4. JUDGMENTS — PARTIES. — A judgment of a court of competent jurisdiction sometimes operates as an estoppel against persons who were not named in the proceedings and were not parties to the record by name. It is enough that they were represented in the action or proceeding which resulted in the judgment, or were entitled to be heard therein. *Aulton v. Rochester*, 619.
  5. MUNICIPAL CORPORATIONS — STREET IMPROVEMENT — UNCONSTITUTIONAL ASSESSMENT. — A land-owner who is a petitioner for street improvement, and who fails to avail himself of an opportunity given of appearing and objecting to the proceedings therefor, or to an assessment which is void and unconstitutional for want of equality, is not estopped by the action of the city council in approving the levy. *Howell v. Tacoma*, 83.
- See CLOUD ON TITLE, 1; DEVISE, 4; HUSBAND AND WIFE, 8; INSURANCE, 17, 18; OFFICERS, 4, 5.

## EVIDENCE.

1. FRAUD — EVIDENCE OF, IN OTHER TRANSACTIONS. — In an action to recover money paid under a contract for the sale of land alleged to have been procured by false and fraudulent representations, evidence of similar representations made to a third party in a similar but distinct transaction is inadmissible. *McKay v. Russell*, 44.
2. HABEAS CORPUS, TESTIMONY TAKEN ON, NOT ADMISSIBLE ON TRIAL OF AG-

CUSED. — Testimony taken before a court on the hearing of a writ of *habeas corpus*, even though written down and signed by the witness, is not admissible in evidence against the accused upon his final trial. A *habeas corpus* proceeding is not an "examining trial," nor is the court in which it occurs an "examining court," within the meaning of the Code of Criminal Procedure. *Childers v. State*, 899.

3. **HOMICIDE — SELF-DEFENSE — CHARACTER OF DECEASED, ADMISSIBILITY OF EVIDENCE OF.** — Where a prisoner on trial for murder claims that the homicide was committed by him while defending his person against an unlawful assault by the deceased, evidence that before the homicide was committed the deceased was pointed out by the witnesses to the defendant, who was a stranger in the community, as a man who, from his own account of himself, was a man of dangerous and desperate character, is admissible to show that the defendant, in repelling the assault, acted under a reasonable apprehension of death or serious bodily harm. Such evidence is admissible for the purpose of enabling the jury to judge the conduct of the accused from his stand-point, and in the light of all the surrounding facts and circumstances attending the homicide, and as the same appeared to him. *Childers v. State*, 899.
4. **BURGLARY — FOOT-TRACKS, TESTIMONY AS TO, ADMISSIBLE.** — On a trial for burglary, a witness may testify that he measured the foot-tracks found at the place where the burglary was committed; that he also examined the shoe that defendant had on just after the burglary; and that upon placing the shoe in the track, he found that it fitted exactly. Such testimony is not inadmissible as calling for the opinion of the witness. *McLain v. State*, 934.
5. **JUDICIAL NOTICE TAKEN OF CESSION OF PORTION OF TERRITORY OF STATE.** — The cession of a portion of the territory of a state to exclusive foreign jurisdiction and control is one of the highest acts of sovereignty, affecting the people of the state at large, and courts of the state will take judicial knowledge of the fact of cession, and that crimes committed within the ceded territory are beyond the jurisdiction of the state courts. *Lasher v. State*, 922.
6. **JUDGMENT OF SISTER STATE — EVIDENCE OF.** — Mere loss of a certified copy of a judgment of a sister state will not warrant the admission of parol evidence of its nature and contents, in the absence of proof that the original record is lost or destroyed. *Kenteler v. Kenteler*, 21.
7. **MURDER BY POISON — DECLARATIONS OF INJURED PERSON ADMISSIBLE AS RES GESTÆ WHEN.** — Where the indictment charges the defendant with intent to murder two persons by mingling poison in coffee, and the evidence shows that on the evening after the burial of one of the persons poisoned, the other one had a severe fit, and as soon as he was able to speak, said, "Go for the doctor, quick! I have taken another cup of that coffee, and it is about to kill me," these declarations are admissible in evidence as part of the *res gestæ*. *Johnson v. State*, 930.
8. **SELF-SERVING DECLARATIONS OF DEFENDANT PROPERLY EXCLUDED.** — Where testimony offered by the accused is self-serving declarations, the court does not err in excluding it. *Hurley v. State*, 916.
9. **JUSTICE'S JUDGMENT, DOCKET ENTRY OF, ADMISSIBLE IN EVIDENCE, WHEN.** — The docket entry of a judgment of a justice of the peace is admissible in evidence, although such entry does not show that the justice waited one hour after the return hour within which to allow the defendant to appear. *Talbot v. Kuhn*, 273.



10. JUDGMENT, NECESSITY OF PLEADING. — When one of the issues in an action is the power of a municipal board to pass a resolution and enter into a contract, a former adjudication in which that point was determined is evidence for the defendant on that issue without being specially pleaded. *Ashton v. Rochester*, 619.
  11. OFFICER'S RETURN TO WRIT PRIMA FACIE EVIDENCE. — An officer's return to a writ is *prima facie* evidence, even in his own favor. *State v. Devitt*, 440.
  12. RECORD-BOOKS INADMISSIBLE AS EVIDENCE OF CESSION TO UNITED STATES OF LANDS FOR FORTS, ETC. — Where the statutes of a state provide that certified copies or certificates of archives of the state department shall be received in evidence in all cases in which the originals would be evidence, an original record-book of a county in which the cession of lands to the United States for a fort has also been recorded is not admissible in evidence to establish such cession. *Lasher v. State*, 922.
  13. CARLISLE TABLES ADMISSIBLE IN EVIDENCE WHEN. — In an action for negligence resulting in death, where the deceased has been shown to have been a strong, healthy man, and his age, occupation, and earning power have been shown, it is competent to show the expectation of life of such a man according to the Carlisle tables of mortality. Since these tables are based upon general population, and not upon selected or insurable lives, they are admissible in such a case, as some evidence competent to be considered by the jury in determining what was the actual expectation of life of the deceased. But the value of such tables, when applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of life, his social surroundings, and other circumstances, and the attention of juries should be pointedly called to those qualifying circumstances. *Steinbrunner v. Pittsburgh etc. R'y Co.*, 806.
- See AGENCY, 2; ANIMALS, 2-4; APPEAL, 4, 7, 9, 10; APOTHECARIES; AUGUSTIONS, 2; CONTRACTS, 4; CORPORATIONS, 11, 14; CRIMINAL LAW, 7, 8, 10; ELECTIONS, 1-4; HOMICIDE; INDICTMENT; INSURANCE, 21; MARRIAGE AND DIVORCE; MUNICIPAL CORPORATIONS; NEW TRIAL; PAYMENT, 1; PARENT AND CHILD; PLEADING, 3, 9; PROCESS; RAILROADS, 1-3, 10, 12, 14; SLANDER, 6, 9; TAXES, 1, 2; TRIAL, 5; USURY, 3; VENDOR AND PURCHASER, 8; WATERCOURSES, 16; WITNESSES.

#### EXECUTION.

1. SHERIFF MAY SHOW HIS RETURN OF NULLA BONA TO BE TRUE THOUGH HE HAD MADE A LEVY. — When a sheriff, whether indemnified or not, returns an execution *nulla bona*, he does so at his own risk, and if it is shown that there is property of the defendant which he might and ought to have levied upon, he will be responsible to the plaintiff; but it is competent for him to show that the property pointed out to him, and upon which he made an actual levy which he subsequently abandoned, was the property of a stranger, and it is error to refuse to permit him to show that fact. *Dornin v. McCandless*, 798.
2. WRIT OF POSSESSION AFFORDS PROTECTION TO OFFICER WHEN. — A writ of possession, which is fair and regular on its face, and is issued by a court having jurisdiction of the subject-matter of the action, constitutes a valid protection to the officer who executes it. *State v. Devitt*, 440.
3. EXECUTIONS — SALES EN MASSE — PAROL WAIVER. — A judgment debtor may, by parol, waive an execution sale of land in parcels, and authorize

its sale *en masse*, and in the absence of a showing that a sale *en masse* was not expressly authorized by the judgment debtor, or that the property was not first offered in parcels and no bids received, the sale will not be set aside. *Hudepohl v. Liberty Hill Water etc. Co.*, 149.

4. **SALES EN MASSE — SETTING ASIDE.** — A sale of property *en masse* under execution will not be set aside, unless it is shown that a larger sum would have been realized from the sale if the property had been sold in parcels, or that a sale of less than the whole tract would have brought sufficient to satisfy the execution. *Hudepohl v. Liberty Hill Water etc. Co.*, 149.
5. **SALES EN MASSE — WHEN WILL BE VACATED.** — Sales of property *en masse* under execution are merely voidable and not void, and one who seeks to set such sale aside must show that none of the conditions which would authorize the sale of all the parcels together existed at the time of the sale *en masse*. *Hudepohl v. Liberty Hill Water etc. Co.*, 149.
6. **IRREGULARITY IN SALE — PROTECTION TO INNOCENT PURCHASER.** — An innocent vendee of the original purchaser at an execution sale of his redemptioner will be protected against irregularities in the sale of which he had no notice, whether he is proceeded against by action or by motion to set the sale aside. *Hudepohl v. Liberty Hill Water etc. Co.*, 149.
7. **CONVERSION. — INNOCENT PURCHASER OF PROPERTY AT AN EXECUTION SALE,** under a writ against one who is not its owner, is guilty of its conversion if he takes possession of it in pursuance of the sale, and afterwards sells it to a third person. *Heberling v. Jaggard*, 331.
8. **EXECUTION OR JUDICIAL SALE OF PROPERTY TO SATISFY A JUDGMENT AND DECREE EXHAUSTS THE POWER TO SELL SUCH PROPERTY** thereunder, and a judgment creditor cannot, after the redemption by a junior encumbrancer, resell it to enforce payment of the unsatisfied part of the judgment. When the junior encumbrancer redeems, he does so for his own benefit, and not for that of the creditor upon whose judgment the sale was made. *Anderson v. Anderson*, 211.
9. **EXECUTION SALE OF PROPERTY UNDER A WRIT AGAINST ONE WHO IS NOT ITS OWNER,** though it is levied upon while in his possession, cannot divest the title of the true owner. *Heberling v. Jaggard*, 331.

See **APPEAL**, 13; **ATTACHMENT**, 1; **CORPORATIONS**, 6, 9; **ESTOPPEL**, 3; **JUDICIAL SALES**; **LEGACIES**.

## EXECUTION SALES.

See **FRAUDULENT CONVEYANCES**, 1-3.

## EXECUTORS AND ADMINISTRATORS.

1. **ADMINISTRATION SALE, ORDER OF PUBLICATION NECESSARY TO VALIDITY OF.** — An order of publication is necessary to give a probate court jurisdiction to order a sale of land for the payment of debts. *Cunningham v. Anderson*, 417.
2. **VOID ADMINISTRATION SALE IS NOT VALIDATED BY ORDER OF APPROVAL.** — An order approving an administration sale cannot by any retroactive effect impart validity to a void sale. *Cunningham v. Anderson*, 417.
3. **PURCHASER AT VOID PROBATE SALE ENTITLED TO REIMBURSEMENT WHEN.** — A purchaser of land sold at an administration sale for the payment of debts, who fails to acquire a valid title because of a mistake in the description of the land, will have an equity to be reimbursed for the pay-

ment of the purchase-money, where it was applied to extinguish the decedent's debts, and also for taxes paid and improvements made by him in good faith. *Cunningham v. Anderson*, 417.

See CLOUD ON TITLE, 1; DEVISE, 4; LEGACIES; WILLS, 8, 9.

#### EXEMPTION.

See MORTGAGES, 5, 7.

#### EXEMPLARY DAMAGES.

See CARRIERS, 3; DAMAGES, 8-12.

#### EXPERTS.

See ANIMALS, 4; APPEAL, 5.

#### EXTINGUISHMENT.

See EASEMENTS, 4; PAYMENT, 2.

#### FALSE IMPRISONMENT.

**MALICIOUS PROSECUTION FOR SLANDER.**—A person arrested and imprisoned on a charge of slander has a cause of action for false imprisonment, but not for malicious prosecution. *Krause v. Spiegel*, 137.

See WITNESSES, 4.

#### FINDINGS.

See TRIAL, 9.

#### FIRE LIMITS.

See INJUNCTION, 3; PLEADING, 2.

#### FOOT-TRACKS.

See EVIDENCE, 4.

#### FORECLOSURE.

See JUDICIAL SALES, 1; MORTGAGES, 1, 2.

#### FORFEITURE.

See INSURANCE, 17; VENDOR AND PURCHASER, 8.

#### FORGERY.

1. **FILLING IN INSTRUMENT OVER GENUINE SIGNATURE FORGERY WHEN.**—Under the Texas statute, it is forgery to make, with intent to defraud or injure, a written instrument by filling in a blank instrument over a genuine signature. *Hooper v. State*, 920.
2. **FORMER ACQUITTAL OF, NO BAR TO PROSECUTION FOR UTTERING INSTRUMENT FORGED.**—The forgery of an instrument and the passing of a forged instrument are two separate and distinct offenses under the code of Texas, and under an indictment for forgery a party cannot be convicted and punished for passing a forged instrument, and *vice versa*. The rule, therefore, that a party can be prosecuted but once for the same transaction, or for offenses growing out of the same transaction, does not obtain in cases of forgery and the passing of forged instruments,

because they are not one and the same transaction, and an acquittal of a charge of forgery is no bar to a prosecution for the uttering and passing of the instrument forged. *Hooper v. State*, 926.

# FORMER ACQUITTAL

See CRIMINAL LAW, 5, 7, 9, 12; FORGERY, 2.

# FORMER JEOPARDY.

See CRIMINAL LAW, 6, 8-11.

# FRAUD.

STATUTE OF FRAUDS WILL NOT BE ALLOWED TO BE USED AS AN INSTRUMENT OF FRAUD if a court can prevent it. *Bork v. Martin*, 570.

See ASSIGNMENT, 6; CLOUD ON TITLE, 2; DAMAGES, 12; EVIDENCE, 1; INSANE PERSONS; INSURANCE, 19; JUDGMENTS, 5, 7; VENDOR AND PURCHASER, 5, 6; WILLS, 4, 6.

# FRAUDULENT CONVEYANCES.

1. EXECUTION SALES — QUIETING TITLE. — A judgment creditor, who is also the execution purchaser, may maintain an action to set aside a fraudulent conveyance of the land purchased, made by the judgment debtor, and to quiet the title acquired at the execution sale. The right to maintain such action is not affected by the fact that the land was purchased by the judgment creditor, because of the existence of such fraudulent conveyance. *Wagner v. Law*, 56.
2. EXECUTION SALES — QUIETING TITLE — PLEADING. — In an action by an execution purchaser to quiet title and to set aside a fraudulent conveyance of the lands, made by the judgment debtor, a statement in the complaint of the facts constituting plaintiff's interest in the lands is sufficient, without an allegation that he has a valid interest in the lands. *Wagner v. Law*, 56.
3. EXECUTION SALES — QUIETING TITLE — PLEADING. — A complaint in an action by a judgment creditor, who is also the execution purchaser, to quiet title and to set aside a fraudulent conveyance of the lands made by the judgment debtor, which fails to aver that the latter had no other property subject to execution at the time the fraudulent conveyance was made, is fatally defective. *Wagner v. Law*, 56.
4. CORPORATIONS. — TRANSFER BY A CORPORATION OF ALL ITS ASSETS, made and accepted for the purpose of suspending and terminating its regular business and rendering it incapable of performing further corporate duties, is illegal as against creditors whose rights are thereby sacrificed and their remedies destroyed, and they may set aside such transfer in so far as it bars their remedy. *Cole v. Millerton Iron Co.*, 615.

See CLOUD ON TITLE, 2.

# GAMING.

GAMING-TABLE, WHAT IS — HOW DETERMINED. — It is not the structure of a table that determines whether or not it is a gaming-table, but the character of the game that is played upon it. A table, to come within the statutory meaning of a gaming-table, must be kept or exhibited for the purpose of obtaining betters. A table with a hole in the center, through which players playing the game of draw-poker drop a chip for

the owner of the table, when they hold threes, flushes, or full hands, is not a gaming-table within the meaning of the statute. *Lyle v. State*, 893.

#### GARNISHMENT.

See ATTACHMENT.

#### GAS COMPANIES.

See NEGLIGENCE, 2, 3.

#### GAS LEASE.

See LANDLORD AND TENANT, 8-10.

#### GRANTS.

1. **DEEDS—GRANT OF PART OF BUILDING AFTERWARDS DESTROYED.**—A grant of a specified room in a particular building, with a right of ingress and egress, must be construed according to the intention of the parties and with reference to the subject-matter; and when it clearly appears from the grant that it was not intended for any interest in the land to pass further than is necessary for the enjoyment of the room granted, the destruction of the building by fire or otherwise terminates all rights of the grantee in the premises. *Hahn v. Baker Lodge*, 723.

2. **DEEDS—GRANT OF PART OF BUILDING—EFFECT OF DESTRUCTION OF WHOLE.**—Where a grant conveys a certain specified room in a particular part of a designated building, without purporting to convey any other interest in the land or building, except the right of ingress and egress, and contains no stipulation as to the right to rebuild in the event of the destruction of the building by fire or otherwise, the destruction extinguishes the identity and existence of the room granted and the rights of the grantee in the premises. *Hahn v. Baker Lodge*, 723.

See CO-TENANCY, 1; EASEMENTS, 2; PRIVATE WAYS, 2; WATERCOURSE, 3, 14.

#### GRAVE-YARDS.

See CEMETERIES.

#### GUARANTY.

**GUARANTOR OF NON-NEGOTIABLE NOTE.**—One who writes his name on the back of a non-negotiable note to give it credit thereby becomes a guarantor, and not an indorser, and is *prima facie* liable on the note upon the default of the principal, without previous demand or notice. Mere delay of the payee to proceed against the principal, or to pursue any other remedy, is not available to such guarantor as a defense to his liability on the note. *First Nat. Bank v. Babcock*, 94.

#### GUARDIAN AND WARD.

See CLOUD ON TITLE, 1; INSANE PERSONS; STATUTES, 4.

#### HABEAS CORPUS.

**VOID JUDGMENT.**—**HABEAS CORPUS** may be maintained for relief against a criminal judgment void for want of jurisdiction, although the judgment defendant has the right of appeal. *In re Permetich*, 80.

See CERTIORARI, 1; EVIDENCE, 2; PARENT AND CHILD.

HEIRS.

See DESCENT; DEVISE, 4; INSURANCE, 6; TRUSTS, 2; WILLS, 8-10.

HIGHWAYS.

See TELEPHONES; WATERCOURSES, 10.

HOMESTEAD.

See CLOUD ON TITLE, 1; DEVISE, 4.

HOMICIDE.

1. **MANSLAUGHTER, LAW OF, OMISSION TO CHARGE, ERROR, WHEN.** — Where, on a trial for murder, the evidence shows that the defendant, at the time of the homicide, was engaged with a constable as one of his posse, in attempting to illegally, and without a warrant, arrest the deceased, who was killed by the posse, through mistake, for another party, whom they had intended to arrest, it is error for the court to omit to charge the jury upon the law of manslaughter, since a homicide committed by the defendant, under such circumstances, while intending only to make an illegal arrest, might be of no higher grade than manslaughter. *Carter v. State, 944.*
2. **HOMICIDE COMMITTED IN ATTEMPTING ILLEGAL ARREST NOT LESS THAN MANSLAUGHTER WHEN.** — Where the defenses are mistaken identity and self-defense, a homicide committed in illegally attempting to arrest the deceased cannot be of a less grade than manslaughter, though committed upon reasonable apprehension of danger. *Carter v. State, 944.*
3. **HOMICIDE BY ONE HAVING PERFECT RIGHT OF SELF-DEFENSE JUSTIFIABLE.** — Where a person, being himself without fault, reasonably apprehends death or serious bodily harm to himself unless he kills his assailant, the killing is justifiable. But a person cannot avail himself of a necessity which he has knowingly and willingly brought upon himself. *Carter v. State, 944.*
4. **RETREAT, LAW OF, NOT APPLICABLE TO CASES OF IMPERFECT SELF-DEFENSE.** — Whenever the question of justifiable homicide is raised by the evidence, the court should fully instruct the jury in regard to the law of self-defense and retreat as enunciated in the Penal Code; but the doctrine of retreat is not applicable to cases of imperfect self-defense, and the omission of the court, in such a case, to charge the jury in regard to the law of retreat is not, therefore, error. *Carter v. State, 944.*
5. **ALL LAW APPLICABLE TO EVIDENCE ADDUCED IN DEFENSE SHOULD BE SET FORTH IN CHARGE TO JURY.** — Since the jury ought, in the trial of one charged with murder, as far as possible, to judge of the facts surrounding the homicide from the stand-point of the defendant, the charge of the court should submit to them all the law legitimately and fairly arising upon the evidence which he has adduced in his defense, whether the court believes it to be true or false. *Carter v. State, 944.*
6. **NO FELONY WITHOUT FELONIOUS INTENT.** — There can be no felony without a felonious intent, the act done characterizing the intent, and not the intent the act. If the intent of a defendant is only to make an illegal arrest, and in attempting to make it he is forced to take the life of the person whom he is trying to arrest, the offense which he was about to commit, being only a misdemeanor under the law of Texas, will be considered in determining the degree of his crime in committing the homi-

cide, and the homicide will be manslaughter, and not murder. *Carter v. State*, 944.

7. **MALICE, DEFINITIONS OF, SUFFICIENT IN CHARGE TO JURY.** — In a charge to the jury on a trial for murder, the following definition of malice is correct: "Malice is a condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken." And so, also, is the following: "Malice, in its legal sense, means the intentional doing of a wrongful act toward another, without legal justification or excuse." *Martinez v. State*, 895.
8. **MURDER — EXPRESS MALICE DEFINED.** — In a charge to the jury on a trial for murder, the following is a correct and sufficient definition of express malice: "Express malice is where one, with a sedate and deliberate mind and formed design, unlawfully kills another, which formed design is evidenced by external circumstances discovering that inward intention, as lying in wait, antecedent menaces, former grudges, concerted schemes to do him some bodily harm, or any other circumstances showing such sedate and deliberate mind and formed design unlawfully to kill another, or to inflict serious bodily harm which might probably end in the death of the person upon whom the same was inflicted." *Martinez v. State*, 895.
9. **IMPLIED MALICE, DEFINITION OF, SUFFICIENT IN CHARGE TO JURY.** — In a charge to the jury on a trial for murder, the following is a correct and sufficient definition of implied malice: "Implied malice is that which the law infers from or imputes to certain acts. Thus when the fact of an unlawful killing is established, and there are no circumstances in evidence which tend to establish the existence of express malice, nor which tend to mitigate, excuse, or justify the act, then the law implies malice." *Martinez v. State*, 895.  
See **CRIMINAL LAW**, 1; **DESCENT**, 2, 3; **EVIDENCE**, 3, 7; **TRIAL**, 8.

#### HUSBAND AND WIFE.

1. **INJURY TO WIFE — PARTIES.** — An action for an injury to a wife, caused by the negligence of a third person, must be brought in the name of her husband; and the wife is a proper, although not a necessary, party plaintiff. *Hawkins v. Front Street etc. R'y Co.*, 72.
2. **INJURY TO WIFE — MEASURE OF DAMAGES.** — In an action by a husband and wife jointly to recover for an injury to her, caused by the negligence of a third person, the measure of damages is compensation for the injury and its subsequent consequences, her pain, suffering, and wounded feelings, the cost of her nursing, medical attendance, and medicines, and the value of her loss of services in the household. *Hawkins v. Front Street etc. R'y Co.*, 72.
3. **A WIFE IS AUTHORIZED TO PLEDGE THE HUSBAND'S CREDIT** for the purpose of obtaining those necessities which he has neglected or refused to furnish. He cannot be held liable for articles purchased by his wife when he has not neglected or refused to furnish her with suitable support. *Bergh v. Warner*, 362.
4. **THE TERM "NECESSARIES,"** as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, and even ornament, as are suitable to maintain the wife according to the estate and rank of her husband. *Bergh v. Warner*, 362.

5. **A MARRIED WOMAN MAY SUSTAIN AN ACTION AGAINST ONE WHO WRONGFULLY ENTICES HER HUSBAND** from her and alienates his affections, if, under the statutes of the state under which she prosecutes her action, she is given power to sue for personal wrongs without joining her husband. *Haynes v. Nowlin*, 213.
6. **SEPARATE ESTATE OF MARRIED WOMAN, WHAT NECESSARY TO CREATION OF.** — No special or technical words are necessary to the creation of a married woman's separate estate, but the intention to exclude the husband's common-law marital rights must be clearly expressed. *Richardson v. De Giverville*, 426.
7. **INTERVENTION OF TRUSTEE NOT NECESSARY TO CREATION OF SEPARATE ESTATE OF MARRIED WOMAN.** — The intervention of a trustee is not necessary to the creation of a married woman's separate estate. *Richardson v. De Giverville*, 426.
8. **MARRIED WOMEN'S CONTRACTS — SEPARATE ESTATE.** — Where a married woman, either directly or through her agent, borrows money from another, the money so borrowed becomes at once a part of her separate estate, and her contract to repay is a contract with reference to her separate estate, which may be enforced against her, and the lender, in the absence of notice to the contrary, has a right to assume that the money was borrowed for the use of the married woman, and she is estopped from denying that fact, unless it is shown that the lender had notice to the contrary. *Scottish etc. Mortgage Co. v. Deas*, 832.
9. **SEPARATE ESTATE OF MARRIED WOMAN MAY BE CONVEYED BY HERSELF ALONE.** — Real estate held by a married woman to her sole and separate use, free from the control of her husband, is her separate estate in equity, and she can convey it by her deed without her husband joining therein, and a contract made by her for the sale of it may be specifically enforced by a court of equity. *Richardson v. De Giverville*, 426.
10. **ANTENUPTIAL CONTRACT DOES NOT SECURE TO WIFE SEPARATE ESTATE IN HER REAL ESTATE WHEN.** — An antenuptial contract made in France, excluding from the community property then owned by the parties, and providing that on the wife's death the husband should have, during his life, the whole of the income arising from all the property then owned by her, or in case of children of the marriage living, half of such income, but not containing any agreement that her real estate should remain her sole estate free from the control of her husband, does not secure to the wife a separate estate in her real estate owned by her in Missouri at the time of the marriage, because it does not show a clear intent to exclude the common-law marital rights of the husband. *Richardson v. De Giverville*, 426.
11. **MARRIED WOMEN'S CONTRACTS — AGENCY — RATIFICATION — SEPARATE ESTATE.** — Where an application for a loan, stating that a wife is the borrower, that the land offered as security is her separate property, and that the only encumbrance thereon is a balance due on mortgage which will be satisfied out of the loan, is signed in the name of the wife by her husband, without her knowledge or consent, while he is acting as her general agent, and such signature is believed by the lender to be the signature of the wife, her subsequent ratification of the application and act of her husband, by herself signing the notes and mortgage issued thereon, will constitute the loan a debt of the wife, for which she is liable. *Scottish etc. Mortgage Co. v. Deas*, 832.



12. **MARRIED WOMAN'S CONTRACT FOR SALE OF REAL PROPERTY NOT HER SEPARATE ESTATE NOT VALID.** — A married woman can convey her real property which is not her separate estate only by a deed jointly executed by herself and husband; and her contract for the sale of it, executed by herself alone, is invalid both at law and in equity. *Richardson v. De Giverville*, 426.
13. **A WIFE MAY APPOINT HER HUSBAND HER ATTORNEY IN FACT** if the statute authorizes her "to execute, acknowledge, and deliver her power of attorney, with like force and effect, and in the same manner, as if she were a single woman." *Wronkow v. Oakley*, 661.
14. **POWER OF ATTORNEY, WHEN AUTHORIZES RELEASE OF DOWER.** — A power of attorney from a wife to her husband, purporting to authorize him to grant, bargain, sell, and convey all lands belonging to her individually and-jointly with others, and for the purpose aforesaid, and in her name to execute and deliver all necessary conveyances, releases of dower and thirds, or right of dower and thirds, or other instruments for conveying, surrendering, or relinquishing all or any part of her estate, right, title, or interest, whether vested or contingent, choate or inchoate, empowers him to execute in the name of his wife a conveyance of lands owned by himself, and therein and thereby to release her right of dower. *Wronkow v. Oakley*, 661.
15. **A WIFE MAY BE THE AGENT OF HER HUSBAND** through his authorization, either expressed or implied. It is implied if he has, without objection, permitted her to contract other bills of a similar nature on his credit, or has paid such bills previously incurred. *Berg v. Warner*, 362.
16. **IMPLIED AGENCY OF WIFE.** — A wife living with her husband is, as the head and manager of his household, presumed to have authority from him to order on his credit such goods or necessities as, in the ordinary arrangement of such household, are required for family use. *Berg v. Warner*, 362.

See CORPSES, 2; MARRIAGE AND DIVORCE; MORTGAGES, 2; PLEADING, 1.

#### IDIOTS.

See INSANE PERSONS.

#### IMPRISONMENT.

See FALSE IMPRISONMENT; MALICIOUS PROSECUTION.

#### IMPROVEMENTS.

See EXECUTORS AND ADMINISTRATORS, 2.

#### INDICTABLE OFFENSES.

See CRIMINAL LAW, 1-3.

#### INDICTMENT.

**MOTION TO QUASH, BECAUSE TAMPERED WITH, PROPERLY DENIED WHEN.** —

A motion made on oath to quash an indictment, upon the ground that it has been tampered with by being interlined and amended as to material matters by some one whose handwriting is different from that of the clerk, district attorney, or foreman of the grand jury, is properly overruled, where, upon the motion being called, the defendant refuses to introduce any evidence or witnesses in support of the matters of fact therein alleged.

to be true, and the court, of its own motion, then calls and examines, under oath, witnesses as to such matters of fact, and finds the allegations to be untrue and not warranted by the facts. *Rahn v. State*, 911.

See CRIMINAL LAW, 7; FORGERY, 2; PERJURY.

### INFANTS.

See INTOXICATING LIQUORS; NEGLIGENCE, 4.

### INJUNCTION.

1. COVENANT AGAINST THE ERECTION OF ANY TENEMENT-HOUSES on any part of the premises conveyed will not be specifically enforced in equity by an injunction, when flats and tenement-houses have already been erected upon the greater portion of the adjacent lots. The only redress upon such covenants is by compensation in damages. *Amerman v. Deane*, 584.
2. MUNICIPAL ORDINANCE — INJUNCTION TO PREVENT VIOLATION OF. — Injunction will issue to prevent the erection of buildings in violation of a municipal ordinance, though they are not nuisances *per se*, if the persons seeking such injunction show that their erection will work special or irreparable injury to them and their property. *First National Bank v. Sarile*, 185.
3. MUNICIPAL ORDINANCE. — INJUNCTION WILL ISSUE AT THE SUIT OF PROPERTY HOLDERS to prevent the rebuilding or repairing of wooden buildings in violation of a municipal ordinance establishing fire limits, and declaring it to be unlawful to alter, repair, or rebuild any frame or wooden building within the limits so established, when it is alleged that if the rebuilding or repairing is permitted, the buildings of the complainants will be thereby made more liable to destruction by fire, and the rate of fire insurance will be increased, and the value of the property depreciated. *First National Bank v. Sarile*, 185.
4. EASEMENT — DESTRUCTION OF MILL-DAM — When the owner of a mill, mill site, and the water rights thereto appertaining is entitled, as against the owner of the land on which the mill-dam destroyed by freshet is situated, to rebuild such dam to its original capacity, he may obtain an injunction restraining such owner from destroying the restored dam, although the effect of the restoration of the dam is to overflow more than formerly the land on which it is situated. *Riverdale Park Co. v. Westcott*, 249.
5. INJUNCTION WILL NOT ISSUE WHEN THE RELIEF SOUGHT IS DISPROPORTIONATE TO THE NATURE AND EXTENT OF THE INJURY SUSTAINED or likely to be sustained. Therefore, where lands have been conveyed with restrictive covenants limiting their use, and the condition and character of the adjoining land with reference to that conveyed have so changed as to render the restriction in the conveyance inapplicable according to its true intent and spirit, equity will not interpose by injunction to prevent the breach of the covenant, but will leave the party aggrieved to his remedy at law. *Amerman v. Deane*, 584.

See CO-TENANCY, 1; EMINENT DOMAIN, 1; JUDGMENTS, 6; NUISANCES, 1; PLEADING, 6; TELEPHONES, 4; WATER COMPANIES.

### INSANE PERSONS.

PERSONS OF UNSOUND MIND, FRAUD OF. — One so weak intellectually as to be incapable of managing his estate, and on that account subject to

guardianship, may still be capable of perpetrating a fraud, and if he does so, the party injured thereby is not in all cases without redress. *Spaulding v. Harvey*, 176.

See WITNESSES, 1.

#### INSOLVENCY.

1. PREFERENCE IN FAVOR OF NON-RESIDENTS. — A transfer to a creditor, which is void by the laws of the state relating to insolvents as an unlawful preference, cannot be enforced by him on the ground that he is a non-resident of the state, and therefore not affected by such laws. *Macdonald v. First Nat. Bank*, 328.
  2. INSOLVENT LAWS ENACTED BY A STATE OPERATE AGAINST NON-RESIDENTS so far as such laws control the disposition of property within the jurisdiction of the state, though they cannot release the insolvent from the obligation to pay debts due from him to persons not resident in the state. *Macdonald v. First Nat. Bank*, 328.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS; CONTRACTS, 4; CORPORATIONS, 15; DEBTOR AND CREDITOR, 3; PAYMENT, 1.

#### INSTRUCTIONS.

See APPEAL, 6; TRIAL.

#### INSURANCE.

1. INTEREST OF ASSURED. — A TENANT WHO HAS AGREED VERBALLY TO KEEP THE DEMISED PROPERTY INSURED has an insurable interest therein, and insurance effected in his name is valid and enforceable. *Berry v. American etc. Ins. Co.*, 548.
2. INTEREST OF ASSURED. — It is not necessary that the insured have an interest, either legal or equitable, in the property insured. It is enough that he is so situated with reference to it that he would be liable to loss should it be injured by the peril insured against. *Berry v. American etc. Ins. Co.*, 548.
3. WHEN SEVERABLE. — When a policy of insurance classifies and specifies numerous items of property and the sums of money for which they are severally insured, the contract is not single, and the insured may sue and recover for loss or damage to any of the several items, although he alleges a total loss of the property insured. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 673.
4. RECOVERY UNDER SEVERABLE CONTRACT — ARBITRATION. — Where a severable policy of insurance upon distinct items of property provides that all differences as to loss or damage shall be submitted to arbitration, and the insured sues to recover for a total loss, he may file an abandonment as to so much of the cause of action as is embraced in a demand that certain differences be submitted to arbitration, and recover for the remainder of the loss. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 673.
5. DOUBLE INSURANCE TAKES PLACE WHEN. — Double insurance takes place when the assured makes two or more insurances upon the same subject, the same risk, and the same interest. In such case, unless otherwise stipulated, the respective insurers are liable *pro rata*, all the policies being considered as together making but one policy. But where two policies cover the same property, but one also covers additional property,

without specifying how much of the insurance applies to each property, a case of double insurance does not arise; certainly not as to the whole amount of those policies. *Clarke v. Western Assur. Co.*, 821.

6. **LIFE — INTEREST OF CHILD OF THE ASSURED.** — Under a policy of insurance on the life of the insured, "for the sole use of his wife if living, and if not living, to her children or their guardian," no interest vested in the children during the life of their mother, but upon her death, in the lifetime of the assured, all her children then living acquired an interest in the policy, and upon the subsequent death of the assured, the persons entitled to the insurance are the children living at the death of the mother, and in the event of the death of any of them after her death and before that of the father, the heirs of the child so dying are entitled to his or her portion of such insurance. *Waleh v. Mutual Life Ins. Co.*, 651.
7. **THE FAILURE OF THE ASSURED TO READ HIS POLICY, OR HIS ABSENCE OF ACTUAL KNOWLEDGE** of the limitations on the power of agents contained therein, is immaterial. The limitations and conditions in the policy are part of the contract which the assured is bound to take notice of, and his ignorance of them cannot be excused on the ground that he had made arrangements with an agent of the insurer to take charge of his insurance interests. *Quinlan v. Providence etc. Ins. Co.*, 645.
8. **THE POWERS POSSESSED BY AGENTS OF INSURANCE COMPANIES**, like those of agents of any other corporations or of an individual principal, are to be interpreted in accordance with the general rule of agencies. No other or different rule is to be applied to a contract of insurance than is applied to other contracts. An agent of an insurance company possesses such powers only as have been conferred verbally or by instrument of authorization, or such as third persons have a right to assume that he possesses. *Quinlan v. Providence etc. Ins. Co.*, 645.
9. **LIMITATION UPON THE POWER OF AGENTS.** — If a policy of insurance declares that no officer or agent shall have power to waive any provision or condition embraced in a printed and authorized policy, but may waive certain added conditions, provided such waiver is written upon or attached to the policy, an attempted waiver by an agent of one of the conditions which the policy declares he shall not have power to waive is inoperative and void. *Quinlan v. Providence etc. Ins. Co.*, 645.
10. **KNOWLEDGE OF AGENT, WHEN IMPUTED TO INSURER.** — When the local agent of an insurance company has actual knowledge of the falsity of an answer to a question in the application for insurance which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the policy on the ground of a false warranty in relation to such answer. *Follette v. Mutual Accident Ass'n*, 693.
11. **CONDITIONS — WAIVER BY AGENT.** — When the insured is led by the conduct of an agent of the insurer, acting within the scope of his authority, to believe that one stipulation in the policy will not be insisted on, or such agent insists upon the performance of another stipulation inconsistent with the enforcement of the first, the latter is deemed to be waived without indorsement on the policy. *Dibrell v. Georgia etc. Ins. Co.*, 678.
12. **KNOWLEDGE OF AGENT — APPLICATION.** — An accident insurance company cannot escape liability under a policy issued by it, on the ground

- that the insured, who was deaf, signed an application stating that he was free from bodily infirmity when the company's agent who filled out the application had full knowledge of the physical condition of the insured at the time. *Follette v. Mutual Accident Ass'n*, 693.
13. **CONDITIONS, WAIVER OF BREACH OF.** — A breach of condition contained in a policy of insurance, requiring the assured to give notice of any suit to foreclose a mortgage or of any loss, and to make proofs of loss within a specified time, is not waived when the agent of the insurance company, having knowledge of the facts, informs the insured, after a loss has been sustained, that the company is attending to it and that it can be collected, if the policy declares that no agent or officer shall have power to waive a breach of such conditions. *Quinlan v. Providence etc. Ins. Co.*, 645.
14. **WAIVER OF CONDITION.** — If a general agent of an insurance corporation, to whom application is made for insurance, is informed that the property belongs to the son of the applicant, and that the latter is to have it as a home during his lifetime, for which he is to have it insured, keep it in repair, and pay taxes, and the corporation thereafter issues a policy of insurance in the name of the applicant, this waives the condition in the policy declaring that it shall be void if, "without notice to this company and permission therefor in writing expressed thereon, the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple," though the policy further provides that no agent has any power to waive any condition therein, and that no notice to, and no consent of or agreement by, any agent of the company shall be binding on it until such notice, consent, or agreement is clearly expressed and indorsed in writing thereon, and signed by such agent. *Berry v. American etc. Ins. Co.*, 548.
15. **TIME TO SUE — WAIVER BY AGENT.** — When an insurance adjuster has a right under the policy sued on to insist upon the production of further proofs of loss in addition to those furnished, such power necessarily involves authority to waive a requirement of the policy that action must be brought within a certain time after loss, if the additional proofs required cannot be obtained within that time. *Dibrell v. Georgia etc. Ins. Co.*, 678.
16. **TIME WITHIN WHICH ACTION MAY BE BROUGHT.** — When a certificate is issued insuring the person therein named against injury, and agreeing to pay him certain sums if such injury disables him from transacting business, and in case his death should result therefrom, then to pay his wife a sum specified, and declaring that no suit shall be brought except within one year of the alleged accidental injury, such time, in the event of his death, is to be computed therefrom, because it is not until such death that the wife receives any injury as a result of the accident. *Cooper v. United States etc. Ben. Ass'n*, 581.
17. **CONDITION AS CONTRACT — WAIVER — ESTOPPEL.** — A condition in an insurance policy that a failure to bring suit within a certain time after loss shall constitute a forfeiture is a contract, and not a statute of limitations, and may be waived by the insurer, or he may be estopped by his acts from insisting upon its enforcement. *Dibrell v. Georgia etc. Ins. Co.*, 678.
18. **TIME TO SUE — WAIVER BY AGENT.** — When an adjuster for an insurer

ance company persistently demands further proofs of loss in addition to those already furnished, with full notice that they cannot be obtained until long after the time within which suit is required to be brought under a condition in the policy, such condition will be deemed to have been waived by the insurer, and he will be estopped from insisting on its enforcement. *Dibrell v. Georgia etc. Ins. Co.*, 678.

19. **CONDITIONS—WAIVER.**—A stipulation in a policy of insurance that no agent of the company is authorized to change its terms and conditions, and that they shall not be waived except in writing indorsed on the policy, does not apply to conditions to be performed after the loss is incurred, nor invariably to the warranties of the contract if any fraud be practiced. *Dibrell v. Georgia etc. Ins. Co.*, 678.
20. **PLEADING—WAIVER.**—When the insured relies upon a waiver of material conditions in the policy of insurance, he must plead it; but if on the trial it becomes necessary for him to show a waiver of some immaterial condition in the policy, he may prove it without having pleaded it, or he may amend his pleadings so as to admit the necessary proof. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 673.
21. **EFFECT OF STATEMENT OF PHYSICIAN IN PROOFS OF LOSS.**—If the proofs of loss offered in favor of the plaintiff in an action upon a policy of life insurance contain the statement of the physician who attended the deceased in his last illness, verified by his oath, from which it appears that the statements made by the deceased in his application for insurance, with respect to the last time he had been attended by a physician, and the cause, were false, such certificate constitutes evidence in favor of the insurer, which it is entitled to have the jury consider, though it was not necessary that the certificate should have contained anything except proof of the death of the assured. *Helwig v. Mutual Life Ins. Co.*, 578.
22. **RESCISSION—TENDER OF DRAFT RECEIVED.**—Where an assured, in compromise of his claim, receives the draft of the insurer, and thereafter seeks to set aside such compromise, and to recover in disregard thereof, it is sufficient for the assured to offer, in his complaint, to surrender such draft, and to follow such offer by producing the draft in court upon the trial, and depositing it with the clerk, to be delivered to the defendant. *Berry v. American etc. Ins. Co.*, 548.

See INJUNCTION, 3; INVENTIONS; MISTAKE; WITNESSES, 2.

## INTEREST.

1. **CONTRACT FOR—COMPUTATION.**—When a note contains an agreement, made either before or after maturity thereof, for the payment of interest annually or semi-annually, the maker is chargeable with interest at a like rate upon each deferred payment of interest; and an independent action may be maintained for its recovery, in like manner as if the maker had given his note for the same amount. *Scott v. Fisher*, 688.
2. **ACCEPTANCE OF THE PRINCIPAL** of a sum to which a claimant is entitled from a city will not preclude him from recovering the interest due thereon, when he claims such interest at the time, and its payment is refused by the city officers, under their erroneous opinion that the statute gives them the right to pay such interest or not as to them seems proper. *Bowen v. Minneapolis*, 333.

See MORTGAGES, 9; STATUTES 8; USURY.

## INTERSTATE COMMERCE.

**INTERSTATE COMMERCE ON HIGH SEAS—CONTROL OF CONGRESS.**—The voyage of a common carrier, made upon the high seas, even though the ports of departure and destination are within the same state, is under the exclusive control of Congress. It is only the internal commerce and navigation of a state that is under the control and regulation of the state. *Cowden v. Pacific etc. Steamship Co.*, 142.

## INTERVENTION.

See HUSBAND AND WIFE, 7.

## INTOXICATING LIQUORS.

**SALE TO MINORS—LIABILITY OF PRINCIPAL FOR SALE BY AGENT.**—A licensed liquor dealer is criminally liable for the unlawful sale of intoxicating liquor to a minor by his clerk or agent, and the fact that the sale was made without his knowledge and contrary to his instructions is no defense. *State v. Kuttelle*, 698.

See ASSOCIATIONS.

## INVENTIONS.

**SYSTEM OF BUSINESS—PROPERTY IN.**—One who communicates to an insurance corporation a new system of soliciting insurance, in a letter requesting employment, cannot, on the corporation's adopting and using the system without giving him employment, sustain an action for an accounting, or to recover compensation for its continuing to use the system notwithstanding his protests. *Bristol v. Equitable etc. Assur. Society*, 568.

## JOINDER.

See PLEADING, 1, 2.

## JUDGMENT.

1. **JUDGMENT EFFECTIVE AS ADJUDICATION AGAINST MARRIED WOMAN WHEN.**—As to her separate property, a valid judgment against a married woman is as effective as an adjudication as though she were sole. *Nave v. Adams*, 421.
2. **JUDGMENT CONCLUSIVE BETWEEN PARTIES ON SAME SIDE OF CAUSE.**—A judgment is conclusive as to issues raised and determined between parties on the same side of the cause. *Nave v. Adams*, 421.
3. **DECREE CONCLUSIVE AS TO EXTINGUISHMENT OF LIEN OF DEED OF TRUST WHEN.**—Where, in a former suit in which an issue was raised as to the validity of a deed of trust as a lien on certain land, the decree rendered ascertained and adjudged the several specific interests of the parties in such a manner as to, in effect, eliminate the lien of the deed of trust, as between the parties, the decree is conclusive as to the extinguishment of the lien. *Nave v. Adams*, 421.
4. **JUDGMENT CONCLUSIVE AS ADJUDICATION, THOUGH PARTIES NOT IDENTICAL.**—A judgment is conclusive of the issues involved in a controversy as between the parties and those standing in privity with them, although in the action in which it is pleaded some only of the parties are litigants. *Nave v. Adams*, 421.
5. **JUDGMENTS AGAINST MUNICIPAL CORPORATIONS OR THEIR OFFICERS.**—When a judgment is rendered against a county, city, or town in its cor-

porate name, or against a board or officer who represents the municipality, in the absence of fraud or collusion, it will bind the citizens and tax-payers, because they are represented in the litigation by agencies authorized to speak for them and to protect their interests. *Ashton v. Rochester*, 619.

6. JUDGMENT AGAINST THE PROPER OFFICERS OF A MUNICIPAL CORPORATION, directing a writ of mandate to issue, requiring them to award a contract for the improvement of a public street, is conclusive against the owners of property liable for such improvement, though they are not parties to the record that such officers had authority to contract for the execution of the work; and therefore an assessment levied after the contract had been let and the work done will not be enjoined at a suit of the property owners, though but for such suit it would appear that facts did not exist warranting the award of the contract. *Ashton v. Rochester*, 619.
  7. RELIEF IN FAVOR OF GRANTEE OF PARTY. — When a judgment has established that a certain person is not the owner of land in dispute, his subsequent grantee thereof, who is out of possession and was not a party to the suit in which such judgment was rendered, cannot maintain a suit at law or in equity to set aside the judgment on the ground of fraud in its procurement. *Whitney v. Kelley*, 106.
  8. WHEN, BY PROCEEDINGS UPON APPEAL, the lien of a judgment is suspended, such lien is released as to all property upon which the judgment could otherwise operate, including property acquired during the pendency of the appeal until the court orders the lien to be restored by redocketing. *Wrontow v. Oakley*, 661.
  9. JUDGMENT ON UNAUTHORIZED FINDING OF JURY IS VOID. — A finding by a jury in a criminal case, that the complaint was malicious and without probable cause, in addition to a finding of not guilty, is unauthorized, and a judgment on such verdict, that the complaining witness pay the costs of suit or stand committed to jail until they are paid, is void. *In re Permetick*, 80.
  10. OFFICER'S RETURN SHOWING THAT A JUDGMENT HAS BEEN SATISFIED by sale under execution issued thereon may be avoided in a subsequent action, by proving that the property sold did not produce a satisfaction of the judgment, for the reason that it was claimed by a third person, who sued the sheriff therefor, and recovered the value thereof. *Stewart v. Duncan*, 367.
  11. An agreement to pay a certain sum when a question is determined in a designated manner must be construed as requiring the decision to be final, and therefore no action upon the agreement can be sustained while the right of appeal exists. *Oakes v. Rogers*, 326.
  12. THE FACT THAT A REFERENCE IS ORDERED for some purpose does not itself determine that a judgment is not final. *Arnold v. Sinclair*, 489.
- See APPEAL, 1, 2, 4, 12-15; ATTACHMENT, 2; CLOUD ON TITLE; COMPROMISE; CORPORATIONS, 6, 9; COVENANTS; CRIMINAL LAW, 6, 10-12; EQUITTY, 2, 4; ESTOPPEL, 3, 4; EVIDENCE, 6, 9, 10; EXECUTION, 3, 8; FRAUDULENT CONVEYANCES, 1-3; HABEAS CORPUS; JUDICIAL SALES; JUSTICE OF THE PEACE; LEGACIES; MUNICIPAL CORPORATIONS, 12; PARTIES; PLEADING, 8; SLANDER, 6.

# JUDICIAL NOTICE

See EVIDENCE, 5.



## JUDICIAL POWERS.

See LEGISLATURE, 4.

## JUDICIAL SALES.

1. **FORECLOSURE OF LIEN—SALE AFTER RETURN DAY.**—The only process provided in California for the enforcement of a judgment foreclosing a lien upon specific property is that prescribed by section 684 of the Code of Civil Procedure, requiring that such judgment be enforced by a "writ" reciting the judgment and directing a sale of the property. Such "writ" is not an "execution" so as to make it returnable within a certain time, as in the case of executions, and a sale under such "writ" may be made after the return day thereof. *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 115.
2. **JUDICIAL SALES AFTER RETURN DAY.**—Where a judgment is not a lien upon property, but a levy under execution is made prior to or upon the return day of the writ, a sale of the property levied upon may lawfully be made after the return day. If a judgment is a lien upon property, or designates the property to be sold, no levy is necessary to a sale, and the property may be lawfully sold after the return day of the writ. *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 115.
3. **SETTING ASIDE SALE MADE AFTER RETURN DAY.**—Where a judgment is a lien upon property, the time within which it may be sold is directory and within the control of the court; and in the absence of proof that injury has resulted from delay in making the sale, it should not be set aside merely because it was not made before the return day named in the order of sale. *Southern Cal. Lumber Co. v. Ocean Beach Hotel Co.*, 115.

See EXECUTION, 8.

## JURISDICTION.

1. **COMMON CARRIERS—FREIGHT DISCRIMINATION—VOYAGE ON HIGH SEAS.**—An action to recover damages for discrimination in freight charges by a common carrier on the high seas between different ports within the same state is exclusively within the jurisdiction of the federal or admiralty courts, unless a common-law cause of action is stated. The state courts have no jurisdiction whether the action is in contract or tort. *Cowden v. Pacific etc. Steamship Co.*, 142.
2. **JURISDICTION OF STATE COURTS OVER CRIMES COMMITTED IN PLACES CEDED TO UNITED STATES.**—Where a state cedes to the United States lands for forts, etc., reserving concurrent jurisdiction to serve state processes, civil and criminal, in the ceded place, such reservation merely operates as a condition of the grant, and does not defeat the exclusive jurisdiction of the United States over such place, and the state courts have no jurisdiction of crimes committed therein. *Lasher v. State*, 922.
3. **TRUSTS.**—A PROBATE COURT HAS NO JURISDICTION to determine whether a devise should be held in trust. Its functions are limited to inquiring and determining whether or not the instrument presented to it as the last will of the decedent was executed by him in the manner prescribed by statute, and when he was legally competent to execute it. *Graham v. Burch*, 359.

See EVIDENCE, 6; EXECUTION, 2; EXECUTORS AND ADMINISTRATORS, 1; HABEAS CORPUS; INSOLVENCY, 2.

## JURY AND JURORS.

See TRIAL.

## JUSTICE OF THE PEACE.

**JURISDICTION OF JUSTICE NOT LOST BY FAILING TO WAIT FOR DEFENDANT'S APPEARANCE.** — Where a justice of the peace has acquired jurisdiction of the defendant by due service of process, he does not lose it by failing to wait one hour after the time stated in the process for the defendant's appearance before rendering judgment against him. The defendant's remedy for such an irregularity is by timely application to the proper court to have the judgment reversed. *Talbot v. Kuhn*, 272.

See EVIDENCE, 9.

## JUSTIFICATION.

See INSURANCE, 7, 10; MINES AND MINING, 3; RAILROADS, 5; SALES, 1; SLANDER, 5.

## LANDLORD AND TENANT.

1. **COVENANT OF LANDLORD TO REPAIR** does not inure to the benefit of a stranger sustaining an injury because of its breach. But when the occasion of the injury constitutes a nuisance as to the party complaining, then the landlord may be charged with damages, on the ground that he maintains a nuisance, where the contract of letting contains a covenant authorising him to re-enter for the purpose of making repairs. *Sterger v. Van Sicklen*, 594.
2. **LANDLORD'S LIABILITY TO THIRD PERSONS** is not enlarged by the fact that he has leased premises with a condition that he may re-enter for the purpose of making repairs. *Sterger v. Van Sicklen*, 594.
3. **LANDLORD DOES NOT OWE ANY DUTY TO THE OCCUPANT OF ADJACENT PROPERTY**, and if the latter chooses to come upon the property of the landlord then in possession of the tenant, and to go up or down back stairs, from a defect in which an injury results to him, the landlord is not answerable through his contract with the tenant to repair such stairs. As to such third person, they were not a nuisance, because neither his property nor his personal rights were invaded. *Sterger v. Van Sicklen*, 594.
4. **FROM TENANT'S holding over after the expiration of his term**, the law implies an agreement to hold for a year upon the terms of the prior lease. The option to so regard it is with the landlord, and not with the tenant, and the latter holds over at his peril. *Haynes v. Aldrich*, 636.
5. **LESSOR'S ELECTION TO TREAT A HOLDING OVER AS A RENEWAL OF THE LEASE** for another year, having been manifested in direct and unequivocal language, is not avoided by evidence that he subsequently visited the premises, and finding them deserted by his tenant, had some repairs attended to, and tried in vain to rent them to another tenant. *Haynes v. Aldrich*, 636.
6. **UNINTENTIONAL HOLDING OVER.** — The fact that a tenant informed his landlord that he did not wish to renew his lease, and that he intended to surrender possession at its termination, but was prevented from doing so for a couple of days by difficulty in procuring trucks and by the illness of a boarder, will not prevent such holding over from operating as a renewal of the lease for another year if the landlord elects to so treat it. *Haynes v. Aldrich*, 636.

7. **LEASE OF LAND FOR OIL PURPOSES, OBLIGATIONS IMPOSED BY.** — A lease of land for oil purposes imposes upon the lessee the duty to test thoroughly the existence of oil in the rocks that should bear it, and if oil be found, to sink so many wells as may be reasonably necessary, in view of operations on adjoining lands, to secure so much of the oil from the land demised as may be obtained with profit. *McKnight v. Manufacturers' etc. Gas Co.*, 790.
8. **LEASE OF LAND FOR GAS PURPOSES, DUTY IMPOSED BY.** — The duty imposed upon a lessee of land to be operated for gas cannot be measured by the same rule that is applied in the case of a lease of land for oil purposes, because there are important differences between oil and gas, which make it necessary to distinguish for some purposes between an oil and a gas lease. *McKnight v. Manufacturers' etc. Gas Co.*, 790.
9. **GAS-WELL — LESSOR NOT BOUND TO SINK UNTIL LESSOR LOCATES WHEN.** — Where a gas lease provides that the lessor shall designate the point at which all wells sunk on the demised premises shall be located, if the lessor has not fixed upon a location for a well, he cannot maintain an action against the lessee for failing to sink a well. *McKnight v. Manufacturers' etc. Gas Co.*, 790.
10. **GAS LEASE — LESSOR IS NOT BOUND TO SINK ADDITIONAL WELLS WHEN.** — Since the product of a gas-well can only be transported to a market when the volume and pressure are sufficient, and the sinking of another well on premises leased may have the effect of so reducing the pressure of a producing well on the same premises as to make the product valueless, there is no implied covenant in a gas lease that the lessee will put down other wells in addition to one which he has sunk and found to be productive, but which he has been compelled to abandon by reason of the happening of an accident thereto. It is therefore error in an action brought by the lessor of land to be operated for gas purposes against a lessee who had sunk one paying gas-well upon the demised premises to recover damages for not sinking other wells upon the premises to protect the territory against the effect of operations on adjoining lands, to charge that a failure to sink such wells was a breach of an implied contract imposing a liability in damages, in the absence of a reasonable excuse for such failure. *McKnight v. Manufacturers' etc. Gas Co.*, 790.

See ADVERSE POSSESSION, 1.

### LARCENY.

- LARCENY OF DOG PUNISHABLE AS FELONY UNDER TEXAS STATUTE WHEN.** — A dog comes within the term "domesticated animal," in the statute of Texas, and, as such, may become the subject of theft; and where the value of the dog stolen is at least fifty dollars, his theft is a felony under the statute. *Hurley v. State*, 916.

See BURGLARY; CRIMINAL LAW, 7, 8.

### LEASE.

See LANDLORD AND TENANT.

### LEGACY.

- EXECUTOR, LEGACY NOT LIABLE TO, IN HANDS OF EXECUTOR, WHEN.** — Where a testatrix in her will declares that a legacy bequeathed by her shall not be seized or levied upon for the debts of the legatee, such legacy

cannot, while in the hands of the executor, be taken under execution by a judgment creditor of such legatee. *Estate of Gee*, 806.

LEGISLATURE.

1. **MUNICIPAL CORPORATIONS — POWER WHICH MAY BE DELEGATED TO.** — The legislature may, by direct enactment, restrict an individual in the exercise of such dominion and control over his own house or premises as may result in injury to others, provided the prohibitory or restraining statute does not, upon its face, discriminate in favor of one person or class of persons over others; and the legislature may delegate such power to municipal corporations. *State v. Tenant*, 715.
  2. **LEGISLATURE CANNOT MAKE THAT A PURPRESTURE OR NUISANCE WHICH IS NOT SO IN FACT.** — The legislature cannot authorize a municipality to make that a purpresture or nuisance which is not so in fact, if by so doing the constitutional rights of any citizen in his person or property are destroyed or infringed. *Grand Rapids v. Powers*, 276.
  3. **CONSTITUTIONAL LAW — OFFICE, LEGISLATURE CANNOT DETERMINE RIGHT TO SALARY OF.** — It is not within the province of the legislature to declare, in an appropriation bill, who are or who are not the legally elected officers of any department, and a statute so declaring, and making it a felony for the auditor of the state to draw his warrant in payment of salary, except to the persons named as officers in the statute, is unconstitutional, and will not be permitted to deprive the officer *de jure* of his salary, though another person is named in the statute as entitled thereto, and payment of a portion of the salary has been made to him. *State v. Carr*, 163.
  4. **CONSTITUTIONAL LAW — ASSUMPTION BY LEGISLATURE OF JUDICIAL FUNCTIONS.** — A statute making an appropriation to pay the salary of an office, and designating a person as entitled to such salary, is, so far as it attempts to determine who is entitled to the office and salary, an assumption by the legislature of judicial powers, and to that extent void. *State v. Carr*, 163.
  5. **CONSTITUTIONAL LAW. — POLICE REGULATIONS MUST HAVE REFERENCE TO THE COMFORT, the safety, or the welfare of society.** Rights of property cannot be invaded under the guise of the police power, nor can the legislature constitutionally declare an act or thing to be a common nuisance which palpably, according to our present experience or information, is not, and cannot be, under any circumstances, a common nuisance by a common-law definition or common-law decision. *First Nat. Bank v. Barile*, 185.
- See ELECTIONS, 6; MUNICIPAL CORPORATIONS, 5; STATUTES; WATERCOURSES, 14, 15, 17.

LICENSE.

See ASSOCIATIONS; REAL PROPERTY.

LIEN.

See APPEAL, 13; JUDGMENTS, 3, 8; JUDICIAL SALES; MORTGAGES.

LIFE TABLES.

See EVIDENCE, 13.

## LIMITATIONS OF ACTIONS.

1. **STATUTE OF LIMITATIONS APPLIES TO EQUITABLE AS WELL AS LEGAL CAUSES OF ACTION.** — The Missouri statute of limitations applies to equitable as well as legal causes of action. *Washington Sav. Bank v. Butchers' etc. Bank*, 405.
2. **TRUSTS — CO-TENANCY.** — **STATUTE OF LIMITATIONS** does not begin to run in favor of the trustee of an express trust in land, or in favor of a co-tenant until there has been a demand for possession by the co-tenant or the *cœtui que trust*, or those claiming under him, and a refusal to deliver by the co-tenant or the trustee in possession. *Maxwell v. Barringer*, 668.
3. **TAX DEED.** — **STATUTE OF LIMITATIONS** cannot be invoked by the holder of a void tax deed. *Hurd v. Brisner*, 17.
4. **RUNNING OF, SUSPENDED WHEN.** — When the president of an insolvent bank, to whom the directors have for years before its suspension intrusted the entire management of its affairs, without authority from, but with the knowledge of, the directors, closes the bank, issues to the creditors scrip payable in three years, and secured by a mortgage on his own property, collects the bank assets and applies them to the payment of the scrip without objection on the part of the directors, the issuance of the scrip will suspend the running, during those three years, of the statute of limitations against the cause of action which the creditors had at the time of the suspension of the bank, against the stockholders, for the amount of their unpaid subscriptions. The act of the president in procuring such extension of time without any act of the directors, though unusual, is binding upon the corporation and its stockholders. *Washington Sav. Bank v. Butchers' etc. Bank*, 405.

See **ADVERSE POSSESSION**, 5, 6; **CLOUD ON TITLE**, 2; **CORPORATIONS**, 7, 9; **INSURANCE**, 15, 17.

## LOTTERIES.

See **STATUTES**, 2, 3.

## LUNATICS.

See **INSANE PERSONS**.

## MAINTENANCE

See **CHAMPERTY**.

## MALICE.

See **DAMAGES**, 10-12; **HOMICIDE**, 7-9; **SLANDER**, 6.

## MALICIOUS PROSECUTION.

**MALICIOUS PROSECUTION OF NON-CRIMINAL CHARGE.** — **ARREST AND IMPRISONMENT** of a person on a charge which does not constitute a crime is not a cause of action for malicious prosecution. *Krause v. Spiegel*, 137.

See **FALSE IMPRISONMENT**.

## MANDAMUS.

**MANDAMUS WILL ISSUE TO COMPEL THE AUDITOR OF STATE TO DRAW HIS WARRANT IN PAYMENT OF THE SALARY OF AN OFFICER DE JURE** who was in possession of the office, although another person was named in the

appropriation bill as being in possession of the office and entitled to the salary, and such bill purported to make it a felony to draw such warrant in favor of any one except the person therein named, and a portion of the salary was, in fact, paid to the person so named, while he was also claiming to discharge the duties of the same office, his title thereto being founded upon an unconstitutional statute. *State v. Carr*, 163.

#### MANSLAUGHTER.

See HOMICIDE, 1, 2, 6.

#### MARRIAGE AND DIVORCE.

IN AN ACTION FOR A BREACH OF CONTRACT TO MARRY, the defendant is entitled to prove, in mitigation of damages, that at the time of such breach he was afflicted with an incurable disease, and that marriage would have an injurious effect upon him, and probably shorten his life, because the advantage to the plaintiff of a union with such a man would be much less than if he were in full health and vigor, with a reasonable expectation of long life and good health. *Mabin v. Webster*, 199.

See PARENT AND CHILD; WILLS, 7.

#### MARRIED WOMEN.

See HUSBAND AND WIFE; JUDGMENTS, 1.

#### MARSHALING SECURITIES.

See MORTGAGES, 5, 7.

#### MASTER AND SERVANT.

See AGENCY, 4; CARRIERS, 3; RAILROADS, 6, 7; SHIPS AND SHIPPING.

#### MENTAL ANGUISH.

See ANIMALS, 5; DAMAGES, 6, 7; SLANDER, 7.

#### MILLS AND MILL-DAMS.

See EASEMENTS, 2, 3; INJUNCTION, 4.

#### MINES AND MINING.

1. MINING PARTNERSHIPS. — THERE IS NO RELATION OF TRUST AND CONFIDENCE between tenants in common who had been partners in the development of lode mining claims, in the absence of a special contract, which prevents one from demanding and receiving more for his interest in the property than is paid therefor to his co-owners. *Harris v. Lloyd*, 475.
2. A MEMBER OF A MINING PARTNERSHIP has a right, without consulting his associates, to sell his interest in the partnership to a stranger, or to purchase the interest of one of his associates without informing the others, or permitting them to share in the benefits of his purchase. *Harris v. Lloyd*, 475.
3. MINING CO-TENANTS, AND THEIR RIGHT TO SWINDLE ONE ANOTHER. — Where persons who are co-tenants of a mine, who have invested their funds in its development, join in a contract of sale made for a consideration expressed therein, and one of them, without the knowledge of the others, but without misrepresentation to them other than that involved in his

joining in such contract, receives from the purchaser a sum much greater than that for which his co-tenants understood the mine to be sold, they cannot, in a suit in equity, compel him to account to them for such excess. *Harris v. Lloyd*, 475.

### MISDEMEANORS.

See HOMICIDE, 6.

### MISTAKE.

1. **MISTAKE, EFFECT OF CORRECTION OF.** — If a mistake is made in a seed-grain note which is intended to be secured by a crop growing upon certain land, the maker may, on discovering the mistake, execute a new note without releasing the lien on the crop, because if he did not do so voluntarily, he might be compelled by a court of equity, in a suit to reform the original note to conform to the actual agreement of the parties. *Miller v. McCarty*, 375.
  2. **EQUITY — MISTAKE OF LAW — RELIEF ON THE GROUND OF.** — AN ASSURED, induced by the false representations of the insurer, through his agent, as to the law governing the case, to surrender a policy of insurance upon payment of a sum much less than that recoverable thereon, is entitled to relief. So held where an agent of an insurance corporation represented to an assured that his policy was void because he was not the sole and unconditional owner of the property at the time the insurance thereon was effected. The corporation must be presumed to have known that it was liable for the whole loss, and to have induced the assured to rely upon its supposed superior knowledge of the subject, and this remains true though the agent who made such representation believed it to be a correct statement of the law applicable under the circumstances. *Berry v. American etc. Ins. Co.*, 548.
- See CONTRACTS, 3; ESTOPPEL, 2; EXECUTORS AND ADMINISTRATORS, 3; MORTGAGES, 8; PLEADING, 8; TELEGRAPHS, 2; VENDOR AND PURCHASER, 1-7.

### MORTGAGES.

1. **LIEN — MOVING HOUSE OFF MORTGAGED PROPERTY.** — Removing a house from mortgaged premises does not impair the lien on the house, and when it is sold in its new situs, under a decree foreclosing the mortgage, the purchaser may again remove it. *Turner v. Mebane*, 697.
2. **REMOVAL OF BUILDING SUBJECT TO, WITHOUT MORTGAGEE'S CONSENT, DOES NOT DESTROY LIEN.** — Where, before the assignment of a mortgage to a *bona fide* assignee, the mortgagor, without the consent of the mortgagee or assignee, removes the buildings from the mortgaged premises to another lot owned by his wife, which she afterwards conveys by a quitclaim deed, such buildings will still remain subject to the encumbrance of the mortgage, and may be sold upon its foreclosure, if the land does not bring enough to satisfy the mortgage debt. *Partridge v. Henmon*, 322.
3. **MORTGAGE UPON A CONTINGENT ESTATE.** — A mortgage executed by one who has an estate in land which is subject to be defeated by his death before that of another person becomes invalid and unenforceable upon the happening of the contingency upon which the estate was to terminate. *L'Etoile v. Henques*, 310.

- 4. PARTITION — RIGHTS OF MORTGAGEES.** — When a tenant in common gives a mortgage on a specific part of the common property, describing it by metes and bounds, under a belief that he owned it in severalty, the mortgagee has an equity to require, when partition is sought by the other co-tenants, that it shall be so made as to allot the specific portion covered by the mortgage as the share of the mortgagor, and thereby save the lien of the mortgage, provided this can be done without prejudice to the rights of the other co-tenants; and this equity, where there are several successive mortgages, inures to each mortgagee in the order of the dates of their several mortgages. The same equitable principles apply, and the same priorities are preserved, in case of a sale, as in case of partition in kind, so far as practicable. *Kennedy v. Boykin*, 838.
- 5. MARSHALING SECURITIES. — WHERE EXEMPT AND NON-EXEMPT PROPERTY** is mortgaged to secure a debt, and a subsequent lien-holder has a lien on the property not exempt, the mortgagor can compel the original mortgagee to first exhaust the non-exempt property. The right of the mortgagor to his exemption is superior to the equity of the junior creditor. *Miller v. McCarty*, 375.
- 6. SUBROGATION. — MORTGAGEES DISCHARGING A PRE-EXISTING LIEN ON THE MORTGAGED PREMISES** are entitled to be subrogated thereto, if they acted in good faith, although the mortgage proved to be void for want of capacity on the part of the mortgagors to execute it. *Spaulding v. Harvey*, 176.
- 7. MARSHALING SECURITIES — WAIVER OF RIGHT TO. — A MORTGAGOR OF PROPERTY**, part of which is exempt from execution, loses his right to compel the mortgagee to first exhaust the non-exempt property if he fails to reasonably assert such right. Nor can the mortgagor require the mortgagee to litigate a doubtful action with a third person for the purpose of protecting the mortgagor's right of exemption. *Miller v. McCarty*, 375.
- 8. RECORD OF, AS NOTICE — MISTAKE.** — A mere mistake in the record of a mortgage as to the number of acres covered by it, when the number of acres stated in the mortgage is accompanied by the words "more or less," will not restrict the lien of the mortgagee to the number of acres stated in the record. In such case the lien of the mortgagee, as against all subsequent mortgagees, extends to all the land embraced within the metes and bounds mentioned in his mortgage, notwithstanding the mistake in the record. *Kennedy v. Boykin*, 838.
- 9. INTEREST — SETTLEMENT.** — When an agreement for supplies is secured by mortgage stipulating for interest at fifteen per cent per annum, the whole to be paid out of the proceeds of a crop by a certain date, and the mortgagor, after such date, gives his note for the balance due, to draw interest at a like rate, the mortgage will only draw legal interest after the date stipulated for its payment; and the balance due, constituting the unpaid debt, so far as it is secured by the mortgage, will draw only legal interest after that date. *Kennedy v. Boykin*, 838.
- See APPEAL, 3; CO-TENANCY, 1; HUSBAND AND WIFE, 11; LIMITATIONS OF ACTIONS, 4.**

#### MUNICIPAL CORPORATIONS.

- 1. NUISANCES.** — MUNICIPAL CORPORATIONS have, without statutory authority, ample power at the common law to cause the abatement of a nuisance,



and if it cannot be otherwise abated, they may destroy the thing which constitutes or creates it. *First Nat. Bank v. Sarlle*, 185.

2. MUNICIPAL CORPORATIONS ARE NOT, AT THE COMMON LAW, AUTHORIZED TO INTERFERE WITH THE ERECTION OR REPAIR OF BUILDINGS, except to prevent the doing of that which, from its nature, would have a tendency to create or enhance danger. *First Nat. Bank v. Sarlle*, 185.
3. ARBITRARY ORDINANCES OF. — An ordinance prohibiting the keeping of certain inflammable or explosive oils within the limits of a municipality, but reserving to the common council the right to grant permission to keep such oils in such locations and buildings and to such persons as it deemed suitable and proper, and to revoke such permission at any time, is void because it may enable such council to arbitrarily control business without any fixed or known rules. *Richmond v. Dudley*, 180.
4. A MUNICIPAL ORDINANCE PROHIBITING THE ALTERING, REPAIRING, OR REBUILDING OF ANY FRAME OR WOODEN BUILDING situate within specified limits, whenever the amount required to alter, rebuild, or repair shall exceed three hundred dollars, is arbitrary, unreasonable, and void, because it prohibits all repairs, whether amounting practically to a rebuilding or not, and whether creating a nuisance, or made with inflammable material or not. Such an ordinance, if sustained, might compel the owner of valuable property to let it become valueless for want of proper repairs, and result in the taking of his property without due process of law, and without the sanction of that overriding necessity by virtue of which, at times, the right of the individual may be sacrificed to the public good. *First Nat. Bank v. Sarlle*, 185.
5. MUNICIPAL CORPORATIONS HAVE POWER TO ENACT REASONABLE ORDINANCES TO SECURE PROTECTION AGAINST FIRE, and while this power may be limited by the legislature, no limitation will be presumed from a statute enumerating some of the common-law powers of municipalities, but not mentioning this power. A municipal corporation has power to enact an ordinance prohibiting the altering, repairing, or rebuilding of wooden buildings within specified limits, in such a manner as to menace the public safety or to endanger adjacent property, under a statute conferring upon it authority to establish fire limits, and to prevent the erection of wooden buildings in such parts of the city as the council may determine. *First Nat. Bank v. Sarlle*, 185.
6. MUNICIPAL ORDINANCE PLACING RESTRICTION UPON LAWFUL CONDUCT OR THE LAWFUL USE OF PROPERTY must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit to the exercise of the privilege all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of the opportunity for the exercise, of any arbitrary discrimination by municipal authorities between citizens who will so comply. *Richmond v. Dudley*, 180.
7. MUNICIPAL CORPORATIONS. — THE ADOPTION OF AN ORDINANCE, THOUGH PRESUMPTIVE, IS NOT CONCLUSIVE EVIDENCE OF ITS REASONABLENESS, and any person affected by it may rebut this presumption by giving in evidence facts showing that in his case its enforcement would be unreasonable. *Mayor v. Dry Dock etc. R. R. Co.*, 609.
8. THE PRESUMPTION IS IN FAVOR OF THE REASONABLENESS OF A MUNICIPAL ORDINANCE, and the burden of proof must be assumed by one who resists it as unreasonable. In the passage of a general ordinance affecting subjects of municipal administration, it will be presumed that the common

- council acted in the exercise of judgment upon the facts, and for reasons calling for such legislative action. *Mayor v. Dry Dock etc. R. R. Co.*, 609.
9. **ORDINANCE—DISCRIMINATION.** — A municipal ordinance which, upon its face, restricts the right of dominion which the individual might otherwise exercise without question, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the governing authorities of the town or city, is unconstitutional and void, as failing to furnish a uniform rule of action, and as leaving the right of property subject to the despotic will of the city council, who may exercise it so as to give exclusive profits or privileges to particular persons. *State v. Tenant*, 715.
10. **ORDINANCES — DISCRIMINATIONS.** — A municipal ordinance providing that no person shall erect any house or building within the city, or add to, improve, or change any building therein, without having first obtained permission from the city council, is unconstitutional and void, as it does not furnish a uniform rule of action for the exercise of discretion in granting permits, and leaves the rights of property subject to the arbitrary discretion of the city council. A subsequent ordinance, containing the same provisions, providing penalties, and adopted to enforce the first ordinance, is void upon the same grounds. *State v. Tenant*, 715.
11. **STREET IMPROVEMENT — UNCONSTITUTIONAL ASSESSMENT.** — An assessment for street improvement, based upon the value of the lots fronting thereon, without regard to the frontage or depth of the lots assessed, and which necessarily causes some of them to pay a much greater sum per front foot than others, is unconstitutional and void for want of equality. *Howell v. Tacoma*, 83.
12. **JUDGMENTS — PARTIES.** — A MUNICIPAL BOARD whose duty it is to enter into contracts for the doing of work upon public streets of a city necessarily represents such city, and judgments against such board compelling it to act with respect to awarding a contract bind the city and the property holders to be affected by the contract, to the same extent as if the judgments were against the mayor and common council of the city. *Ashton v. Rochester*, 619.
13. **MUNICIPAL CORPORATION COMPELLED TO PAY DAMAGES RESULTING FROM DEFECTIVE SIDEWALK CANNOT RECOVER BACK FROM ADJUTING OWNER.** — A municipal corporation cannot recover back from an owner of property fronting on one of its streets damages which it has been compelled to pay to a person for injuries received by reason of its failure to keep the sidewalk in front of said property free from snow and ice, notwithstanding an ordinance of the city requires such owner to keep his sidewalk free from snow and ice, and imposes a penalty for its violation. *St. Louis v. Connecticut etc. Ins. Co.*, 402.
- See ASSOCIATIONS; EQUITY, 2; ESTOPPEL, 5; EVIDENCE, 10; INJUNCTION, 2, 3; INTEREST, 2; JUDGMENTS, 5, 6; LEGISLATURE, 1, 2; PLEADING, 2; RAILROADS, 13-15; STATUTES, 8; TELEPHONES, 1, 4; WATER COMPANIES; WATERCOURSES, 17.

# MURDER.

See HOMICIDE.

# MUTILATION.

See PAYMENT, 1.

## NAVIGATION.

See WATERCOURSES, 2.

## NECESSARIES.

See HUSBAND AND WIFE, 3, 4, 16.

## NEGLECTANCE.

1. SUFFICIENCY OF COMPLAINT. — A complaint in an action to recover for personal injuries caused by the negligence of the defendant need only allege that the injuries were so caused, and the facts from which the negligence may be reasonably inferred by the jury. *Madden v. Port Royal etc. Ry Co.*, 855.
  2. GAS COMPANY HAVING MAINS AND PIPES laid in the streets of a city owes a duty to the owners of realty therein to use reasonable and ordinary care in so planting its mains and pipes as to prevent the escape of gas therefrom in such quantities as to become dangerous to life or property. *Mississinewa Mining Co. v. Patton*, 203.
  3. NEGLIGENCE OF A GAS COMPANY resulting in the escape of its gas from its pipes and mains into plaintiff's lot and his dwelling thereon, where it explodes, sets fire to, and destroys such dwelling and its contents, renders the company answerable to the plaintiff for the loss thus occasioned. *Mississinewa Mining Co. v. Patton*, 203.
  4. DAMAGES FOR DEATH OF CHILD EN VENTRE SA MERE. — In an action to recover for negligent injury to a woman pregnant with child, she cannot recover for the premature birth and death of the child as a result of the injury, but she may recover for her suffering and impaired health resulting from such death, if due to the injury received by her. *Hawkins v. Front Street etc. Ry Co.*, 72.
- See ANIMALS, 3; DAMAGES, 11; EVIDENCE, 13; HUSBAND AND WIFE, 1, 2; MUNICIPAL CORPORATIONS, 13; PLEADING, 4, 8; RAILROADS, 5, 8, 11, 12; SHIPS AND SHIPPING; TRIAL, 1.

## NEGOTIABLE INSTRUMENTS.

1. PROTECTION TO PURCHASER AFTER MATURITY. — All purchasers of negotiable paper who purchase after maturity from an innocent holder for value take the paper free from all equities and defenses existing between the original parties to it. *Koehler v. Dodge*, 518.
2. INDORSEMENT AS SECURITY BEFORE MATURITY — RIGHTS OF PLEDGEE. — When negotiable paper is indorsed and transferred before maturity as collateral security for a loan of money then made, the pledgee who takes the paper without notice of any defense is a holder for value in the usual course of business. *Koehler v. Dodge*, 518.
3. PURCHASER FROM PAYEE AFTER MATURITY. — One who purchases a negotiable note after maturity from the payee is not an innocent holder, and takes the paper subject to the same defenses that existed between the original parties to it. *Koehler v. Dodge*, 518.
4. PROMISSORY NOTES — STIPULATION FOR ATTORNEY'S FEE. — A stipulation in a note payable to order, providing for the payment of an attorney's fee if suit is commenced to enforce payment, renders the note non-negotiable. *First Nat. Bank v. Babcock*, 94.
5. STIPULATION IN A BILL OF EXCHANGE to pay all attorney's fees in case of

suit thereon does not destroy its negotiability. *Bank of Commerce v. Fuqua*, 461.

6. **ATTORNEY'S FEES, RIGHT TO RECOVER** — **STIPULATION IN A BILL OF EXCHANGE** that the parties thereto agree to pay all attorney's fees in case of suit on this paper entitles the holder of the bill to recover for such fees in an action brought to enforce payment of the bill. It is not necessary for him to resort to an independent action for that purpose. *Bank of Commerce v. Fuqua*, 461.
  7. **ATTORNEY'S FEES. — AGREEMENT IN A BILL OF EXCHANGE** to pay all attorney's fees in case of suit thereon is not usurious, nor against public policy, and is therefore enforceable. *Bank of Commerce v. Fuqua*, 461.
- See CHECKS; CONTRACTS, 3, 4; GUARANTY; INSURANCE, 22; INTEREST, 1; MISTAKE, 1; PARTNERSHIP; PAYMENT; SURETYSHIP; USURY.**

### NEWSPAPERS.

**See CONTEMPT, 2, 3.**

### NEW TRIAL

**EVIDENCE ON MOTION FOR.** — When, on the hearing of a motion for a new trial in a criminal case, evidence is introduced showing that the jury had read newspaper articles during the trial, claimed to have a tendency to influence their verdict, the rebutting evidence of the jurors themselves, that the reading of such articles did not influence, nor tend to influence, them in any way prejudicial to the accused in rendering their verdict, is admissible. *People v. Murray*, 113.

### NONSUIT.

**See TRIAL, 3.**

### NOTICE.

**See ANIMALS, 1; ASSIGNMENT, 5; AUCTIONS, 2; CHECKS, 2; CORPORATIONS, 11, 12; EXECUTION, 6; GUARANTY; HUSBAND AND WIFE, 3; INSURANCE, 7; MORTGAGES, 8; WATERCOURSES, 17.**

### NUISANCE.

1. **TELEPHONE COMPANY — ERECTION OF POLE IN STREET — INJUNCTION.** — A declaration alleging that plaintiff is possessed of a valuable warehouse, and that defendant, a telephone company, without his authority or consent, and without making or offering to make compensation therefor, has planted a large and unsightly pole in front of such warehouse, which obstructs and prevents the comfortable, reasonable, and beneficial enjoyment and use of such premises, without alleging the mode and manner of such obstruction and interference, states a cause of action, and may properly include a prayer for injunction. *Cheapeaks etc. Telephone Co. v. Mackenzie*, 219.
  2. **NUISANCE PER SE, FIRE-ENGINE HOUSE IN CITY IS NOT.** — A fire-engine house in a city, erected under a power given by its charter, is not per se a nuisance. *Van De Vere v. Kansas City*, 396.
- See INJUNCTION, 2; LANDLORD AND TENANT, 1, 3; LEGISLATURE, 25; MUNICIPAL CORPORATIONS, 1; TELEPHONES, 1.**

## OATH.

See OFFICERS, 2.

## OFFICERS.

1. **OFFICIAL BONDS — ALTERATION — RATIFICATION — LIABILITY OF SURETIES.** — When an official bond is altered after signing, but before delivery and approval, by the erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of or did not consent to the alteration nor ratify it; but if the sureties, with knowledge of the alteration, accept indemnity from the principal obligor, they thereby adopt and ratify the bond, and are thereafter liable thereon. *Hagler v. State*, 514.
2. **QUALIFICATION — OFFICIAL BOND — MANDATORY PROVISIONS OF CONSTITUTION.** — When the plain mandate of the state constitution is that the person appointed to the office of state treasurer shall qualify by taking the constitutional oath of office within one month after his appointment, the failure of the person appointed to such office to take such oath, or file his official bond until more than a year after his appointment, will prevent him from being legally inducted into office, and no action can be maintained on his official bond, filed and approved at the time he attempted to take the oath of office. *Archer v. State*, 261.
3. **QUALIFICATION — OFFICIAL BOND — LIABILITY OF SURETIES.** — The official bond of a public officer does not make the sureties thereon responsible for the discharge of any duties by him except those that become incumbent upon him by his appointment or election and a due qualification thereunder; and when he has failed to qualify as required by the constitution or laws, the bond never becomes effective, and no action will lie thereon. *Archer v. State*, 261.
4. **QUALIFICATION — OFFICIAL BOND — LIABILITY OF SURETIES.** — When a person legally appointed to a public office for a certain term, and until his successor is appointed and qualified, has duly qualified under such appointment, and is subsequently reappointed upon the expiration of his first term to succeed himself, but fails to qualify under his second appointment, and is never legally inducted into office thereunder, his official bond filed under the second appointment is of no effect, and the sureties are not liable thereon. In such case the doctrine of estoppel and of voluntary official bonds has no application against the sureties. *Archer v. State*, 261.
5. **VOLUNTARY OFFICIAL BONDS — LIABILITY OF SURETIES.** — A voluntary official bond can only be enforced against the sureties therein, when by virtue of the execution and delivery of such bond, the principal therein has been inducted into office, and has become possessed of the things appertaining thereto. In such case the sureties, having by their act enabled their principal to obtain the office, are estopped to deny their liability for his official acts. *Archer v. State*, 261.
6. **OFFICIAL BOND — LIABILITY OF SURETIES.** — When an official bond is executed and delivered by sureties to their principal, they thereby clothe him with authority to deliver it, for the purposes for which it was executed; but they give him no authority to deliver it for any other purpose than that which its terms show that it was intended to serve. *Archer v. State*, 261.
7. **SALARY IS AN INCIDENT OF OFFICE, AND BELONGS TO THE PERSON HOLDING THE LEGAL TITLE** to the office, and he can sue for and recover it

when he is a state officer occupying apartments assigned to him and discharging the duties of the office, although another person, claiming to be in possession of the office and to exercise its functions, has received from the proper officers of the state payment of the salary due to the officer *de jure*. *State v. Carr*, 163.

8. THE SALARY OF AN OFFICER DE JURE CANNOT BE WITHHELD FROM HIM because, in the statute making the appropriation of moneys for the salary and expenses of the office, another person is named as the incumbent entitled to the salary. The statute will be construed as intending that the salary be paid to the officer entitled to the office, though it names as such officer a person not so entitled. *State v. Carr*, 163.

9. A DE FACTO OFFICER HAS NO RIGHT TO THE EMOLUMENTS OF THE OFFICE, the duties of which he performs under color of an appointment, but without legal title, and hence cannot maintain an action for the salary. *State v. Carr*, 163.

See ATTACHMENT, 1; CONSTITUTIONS; CORPORATIONS, 13; EXECUTION, 2; JUDGMENTS, 5, 6; LEGISLATURE, 3; MANDAMUS; STATUTES, 7; TRESPASS.

#### OFFICIAL BONDS.

See OFFICERS, 1-6.

#### OIL LEASE.

See LANDLORD AND TENANT, 7-10.

#### OLEOMARGARINE.

See SALES, 1.

#### ORDINANCES.

See MUNICIPAL CORPORATIONS.

#### PARENT AND CHILD.

**HABEAS CORPUS — CUSTODY OF MINOR CHILDREN.** — In *habeas corpus* by a mother against a father to recover the possession of their minor children, claimed to have been awarded to the custody of the mother in divorce proceedings in another state, evidence that the mother is unsuited to have control of them, because of her immorality and her financial inability to support them, and that the father is a more suitable person to have the custody of them, and better able financially to care for, rear, and educate them, is sufficient to support a decree awarding the custody of such children to their father. *Kentzler v. Kentzler*, 21.

See DESCENT, 1, 3; INSURANCE, 6.

#### PAROL AGREEMENT.

See DEEDS.

#### PARTIES.

**JUDGMENTS.** — THE TERM "PARTIES" INCLUDES all who are directly interested in the subject-matter, and who have a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. *Ashton v. Rochester*, 619.

See CLOUD ON TITLE, 1; ESTOPPEL, 4; HUSBAND AND WIFE, 1, 5; JUDGMENTS, 2, 4, 7; MUNICIPAL CORPORATIONS, 12; NEGOTIABLE INSTRUMENTS, 1, 3; PROCESS.

### PARTITION.

See MORTGAGES, 4.

### PARTNERSHIP.

**AGREEMENT BY PARTNER TO PAY DEBTS OF.** — If a partnership is dissolved, and one of its members agrees to discharge all its liabilities, a note subsequently executed by him in the firm name, in consideration of a pre-existing partnership indebtedness, extending the time for its payment, cannot be enforced against his copartners if the payee knew of the existence of the agreement, because after such agreement the position of the other partners was that of sureties to the partner who had agreed to pay the debt, and the creditor should not be allowed to make a new contract extending the time of payment without their consent. The new note is therefore binding only upon the partner who executed it. *Leithauer v. Baumcister*, 336.

See EQUITY, 4; MINES AND MINING.

### PATENTS.

See PUBLIC LANDS, 2.

### PAYMENT.

1. **WHAT IS NOT.** — An action against a bank to recover the amount of an undorsed note cannot be maintained, when it appears that the bank received the note for collection, and upon presenting it to the maker, who was a customer of the bank, he indorsed upon it, "Please charge the same to my account," and the evidence shows that he was at the time a debtor of the bank, but the latter, supposing him to be in good credit, charged the amount of the note to his account, marked it canceled, and afterwards on the same day, upon discovering that he was insolvent and had assigned his property for the benefit of his creditors, indorsed the note as "charged in error," "canceled in error," and obtained from the post-office and canceled a check for the amount of the note drawn by it in favor of the payee, and immediately returned the note to him, with a letter advising him of the facts. Such transaction by the bank, unknown to the payee, does not constitute a payment of the note, nor deprive him of his right of action thereon against the maker, and in such action the mutilation of the note by the bank may be explained and accounted for. *Steinhart v. Nat. Bank*, 132.
  2. **NOTE OR CHECK FOR ANTECEDENT DEBT.** — When a creditor takes a note or check for an antecedent debt, it does not operate to extinguish the debt, unless it is received by express agreement as payment. *Steinhart v. Nat. Bank*, 132.
- See ATTACHMENT, 2; AUCTIONS, 1; CONTRACTS, 3, 4; CORPORATIONS, 4, 10, 15; DEBTOR AND CREDITOR, 3; EXECUTION, 8; EXECUTORS AND ADMINISTRATORS, 1, 2; INSURANCE; INTEREST; MANDAMUS; MORTGAGES, 9; PARTNERSHIP; STATUTES, 8; WATER COMPANIES.

## PERJURY.

**MATERIAL ALLEGATION IN INDICTMENT FOR.** — Where an indictment for perjury charges that the accused committed perjury by swearing that he did not execute a certain order in writing, which is set out in *hoc verba* in the indictment, it is not necessary that the indictment should allege the materiality of such order, the execution of the instrument, and not the instrument itself, being the material subject of inquiry before the grand jury. *Rahn v. State*, 911.

See TRIAL, 7.

## PERSONAL PROPERTY.

See CONTRACTS, 1.

## PHYSICIANS AND SURGEONS.

See ANIMALS, 4; INSURANCE, 21; SHIPS AND SHIPPING, 1; WITNESSES, 2.

## PLEADING.

1. **HUSBAND AND WIFE, JOINDER OF.** — A complaint in which the names of a husband and wife appear in the caption as plaintiffs, but the body of which states a cause of action in her favor alone, and does not mention him, may be regarded as good upon demurrer, by treating the mentioning of him in the caption as a mere surplusage. *Mississinewa Mining Co. v. Patton*, 203.
2. **JOINDER OF PARTIES.** — OWNERS OF SEPARATE PARCELS OF REAL PROPERTY may unite in a suit to enjoin the repairing or rebuilding of a wooden building within the fire limits of a municipality, whereby their property will be diminished in value, and subjected to increased danger of destruction by fire. Their common danger and common interest in the relief sought authorize them to join in one action. *First Nat. Bank v. Sarle*, 185.
3. **INSTRUCTION.** — When a complaint alleges the possession by plaintiff of a warehouse, and an interference with his use and enjoyment thereof by the erection of a telephone pole, without alleging a reversionary interest in the warehouse, and the proof shows that the premises were in the possession of a tenant of the plaintiff, a prayer for an instruction that plaintiff is not entitled to recover damages for the erection of the pole, without making any reference to the pleadings, is properly refused, if the evidence is sufficient to sustain any action by plaintiff as the owner of the reversion in the warehouse. *Chesapeake etc. Telephone Co. v. Mackenzie*, 219.
4. **A COMPLAINT CHARGING NEGLIGENCE IN GENERAL TERMS** is good upon demurrer. *Mississinewa Mining Co. v. Patton*, 203.
5. **A MOTION TO STRIKE OUT** admits the truth of all the facts well pleaded, and therefore should not be sustained if the facts stated are relevant to the question to which they are addressed, though not sufficient to withstand a demurrer. Such a motion does not perform the office of a demurrer. *Mabin v. Webster*, 199.
6. **DEMURRER — INJUNCTION.** — The question as to whether the additional relief asked by way of injunction is appropriate or not, under the facts disclosed by the declaration, must be raised by special demurrer, and a general demurrer, whether interposed directly to the declaration or to



- some subsequent pleading, will not be sufficient to raise that question. *Chesapeake etc. Telephone Co. v. Mackenzie*, 219.
7. **GENERAL DENIAL.** — THE RESCISSION OF A CONTRACT must be alleged as an affirmative plea, and therefore cannot be presented as a defense under the general denial. *Mabin v. Webster*, 199.
8. **FINDINGS.** — Where, in an action by a vendee to rescind a contract for the purchase of land on the ground of mistakes of fact, the answer alleges that such mistakes were the result of the negligence of the vendee, and sets out the facts, a finding by the court that "these mistakes were caused by the neglect of a legal duty on the part of the plaintiff," is a conclusion of law, and not a finding of fact, and in the absence of other findings, entitles the vendee to a reversal of the judgment against him. *Goodrich v. Lathrop*, 91.
9. **DAMAGES.** — Causes of action in tort, and sounding in damages, either actual or exemplary, must be properly pleaded. The complaint must state the kind of damages claimed, and the testimony, and the jury must be restricted to the allegations. *Spellman v. Richmond etc. R. R. Co.*, 358.
10. **PLEADING STATUTE OF ANOTHER STATE.** — One relying upon a statute of a state under which a contract was made, as a defense against its enforcement, should set out, at least substantially, the statute on which he relies. The law must be averred and proved in the same manner as any other fact. An averment that by a statute of the state wherein the contract was made only \$2.50 is allowed for an attorney's fee in such a case, and that a contract for a greater sum for attorney's fees is by the laws of that state illegal and void, is not a sufficient pleading of the statute upon which defendant relies. *Bank of Commerce v. Fuqua*, 461.
11. **SUPPLEMENTAL PLEADING MAY INTRODUCE FACTS THAT HAVE TRANSPIRED SINCE SUIT COMMENCED.** — A party to a suit may by supplemental pleading bring forward facts that have transpired since the institution of the suit, which may tend to strengthen or reinforce the cause of action or defense stated in the pleadings before the court. *Nave v. Adams*, 421.
- See ADVERSE POSSESSION, 6; APPEAL, 7, 15; CARRIERS, 1; CLOUD ON TITLE, 1; COMPROMISE; DAMAGES, 10; EVIDENCE, 10; FRAUDULENT CONVEYANCES, 2, 3; INSURANCE, 20; JUDGMENTS, 4; NEGLIGENCE, 1; NUISANCES, 1; RAILROADS, 2, 3, 5; SALES, 2; SLANDER, 1, 2; TRIAL, 3, 4; TROVER.

#### PLEDGE

See NEGOTIABLE INSTRUMENTS.

#### POISONING.

See EVIDENCE, 7; TRIAL, 3.

#### POLICE POWER.

See LEGISLATURE, 5.

#### POLLUTION.

See WATERCOURSES, 4, 5.

#### POSSE.

See HOMICIDE, 1.

## POWER OF ATTORNEY.

See HUSBAND AND WIFE, 14; PUBLIC LANDS, 2

## PREFERENCES.

See INSOLVENCY, 1.

## PRESUMPTION.

See AGENCY, 2; CORPORATIONS, 14; DAMAGES, 11, 13; ELECTIONS, 3; TAXES, 1; TRIAL, 6.

## PRINCIPAL AND AGENT.

See AGENCY.

## PRIVATE WAYS.

1. INTERFERENCE WITH, BY OWNER OF FEE. — Where a right of way is granted without metes or bounds or description defining its width, the owner of the fee may contract the width of the way, or obstruct it in any manner, so long as he does not interfere with its necessary and reasonable use for the purposes for which it was granted. *Frank v. Benesch*, 237.
2. RIGHT TO CONTRACT OR OBSTRUCT. — The owner of the fee in an alley, as against the owner of a right of way therein by grant, may change the position of a gate in the alley, erect a wooden platform across it, and contract its width an inch and a half by wainscoting the walls leading from the old entrance to the new gate, if these acts do not interfere with the necessary and reasonable use of the right of way; and whether they do or not is a question for the jury to determine. *Frank v. Benesch*, 237.

## PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT.

## PROCESS.

OFFICER'S RETURN IS USUALLY CONCLUSIVE upon the same parties in the same action, and others in privity with them, but in other actions is *prima facie* evidence only. *Stewart v. Duncan*, 367.

See ATTACHMENT, 1; JURISDICTION, 2; JUSTICE OF THE PEACE.

## PROFITS.

See CO-TENANCY, 2.

## PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS, 4.

## PROPERTY RIGHTS.

See DAMAGES, 12; LEGISLATURE, 5.

## PROSECUTING ATTORNEY.

See CRIMINAL LAW, 12.

## PUBLICATION.

See EXECUTORS AND ADMINISTRATORS; WILLS, 7.

## PUBLIC LANDS.

1. DEEDS — QUITCLAIM — COVENANT AS TO AFTER-ACQUIRED TITLE — A quitclaim deed to state lands, made after a party has prepared but before he has filed his application to purchase, passes no interest therein to his grantee; and a covenant in the *habendum* clause, that any after-acquired title shall vest in the grantee, will not of itself vest such title in the grantee upon its acquisition by the grantor. *Anderson v. Yoakum*, 121.
2. PUBLIC LANDS ENTERED UNDER POWER OF ATTORNEY AUTHORIZING THEIR CONVEYANCE. — A United States patent to land as an additional soldier's homestead, the entry for which was made in the name of the soldier by his attorney in fact, acting under an irrevocable power of attorney, executed two years previously, and containing a relinquishment of dower, is valid. Although the land was conveyed in the soldier's name alone, after entry and approval, but before the issuance of the patent, a grantee, claiming under such patent, has a perfect title, good at law, and secure against a suit in equity to annul the patent. *Montgomery v. Pacific Coast Land Bureau*, 122.

## PUBLIC POLICY.

See CHAMPERTY, 2; NEGOTIABLE INSTRUMENTS, 7.

## PUBLIC TRIAL.

See CRIMINAL LAW, 4, 6.

## PUNISHMENT.

See DAMAGES, 9, 11; TRIAL, 6.

## PURPRESTURE.

See LEGISLATURE, 2.

## QUALIFICATIONS.

See CONSTITUTIONS; ELECTIONS, 1-4; OFFICERS, 2-4.

## QUASHING.

See INDICTMENT.

## QUIETING TITLE.

See CLOUD ON TITLE; FRAUDULENT CONVEYANCES, 1-3; TAXES, 1.

## QUITCLAIM DEEDS.

See CLOUD ON TITLE, 1; DEVISE, 4; MORTGAGES, 2; PUBLIC LANDS, 1.

## RAILROADS.

1. DAMAGES — EXEMPLARY — EVIDENCE OF CUSTOM. — In an action against a railroad company to recover exemplary damages for the wrongful act of its conductor in ejecting plaintiff from a train, the custom of the company in regard to tickets may be proved by parol, but the consequence to the conductor if he violates such custom is immaterial, and proof thereof is inadmissible. *Spellman v. Richmond etc. R. R. Co.*, 858.
2. DAMAGES — EXEMPLARY — EVIDENCE. — Where the complaint, in an action against a railroad company to recover exemplary damages for ejecting plaintiff from a train, alleges that his ticket was extended in time by the

company's agent, under authority of a letter from another of its agents, and the answer admits an agreement to extend the time, as alleged, the letter, after identification, is admissible in evidence without proof of its execution. *Spellman v. Richmond etc. R. R. Co.*, 858.

6. **DAMAGES — EXEMPLARY, FOR EXPULSION FROM TRAIN.** — When the cause of action against a railroad company to recover exemplary damages for ejecting plaintiff from a train is properly pleaded, and is supported by the evidence, the issue of exemplary damages should be submitted to the jury, under instructions that plaintiff is entitled to recover such damages for a willful and malicious invasion of his rights by the conductor of the company on the train. *Spellman v. Richmond etc. R. R. Co.*, 858.
4. **DAMAGES — EXEMPLARY — RECKLESS FAILURE TO DELIVER PASSENGER AT HIS DESTINATION.** — Where a railroad corporation fails to land a passenger at his exact destination, according to its contract, it is liable in damages therefor, unless it can show some controlling exigency preventing it from fulfilling its engagement; and if it, by its conductor, unlawfully expels the passenger at some other point, in an oppressive, malicious, reckless, insulting, or unnecessarily rude and violent manner, it is liable in exemplary damages. *Samuels v. Richmond etc. R. R. Co.*, 883.
5. **NEGLIGENCE — SUFFICIENCY OF COMPLAINT.** — A complaint in an action against a railway company to recover for personal injury caused by its negligence, which alleges that defendant, well knowing that plaintiff was a passenger, the delicate state of her health, and that it was dangerous for her to alight from the train without the aid of a foot-stool, failed to stop its train at the usual place at the station to which she had bought a ticket, but stopped at a more dangerous place, and, contrary to its custom, failed to furnish a foot-stool to assist her to alight, by reason of which facts, and the further fact that the train stopped only a short time, plaintiff was compelled to jump from the train to the ground, and in so doing sustained the injuries complained of, sufficiently states a cause of action, without stating the probative facts necessary to sustain the allegation of knowledge on the part of the defendant. *Madden v. Port Royal etc. R'y Co.*, 855.
3. **MASTER AND SERVANT — FOREMAN OF LABORERS VICE-PRINCIPAL, NOT FELLOW-SERVANT, WHEN.** — A foreman having charge of laborers engaged in the removal of a railroad company's building is a vice-principal of the company, and not a fellow-servant of the laborers. *Sullivan v. Hannibal etc. R. R. Co.*, 388.
7. **DEFECTIVE APPLIANCE, LIABILITY OF MASTER FOR INJURY TO SERVANT RESULTING FROM THE USE OF.** — Where a foreman, who is the vice-principal of a railroad company, orders a laborer to use a defective staging, and injury results to the latter from such use, the company is liable therefor. And although the laborer injured knew, to a certain extent, of the defect in such staging, but did not know the danger to which he was subjected by reason of the defect, while the foreman did know it, or could have known it if he had done his duty, the company will be liable for the injury resulting from the fall of such defective staging. *Sullivan v. Hannibal etc. R. R. Co.*, 388.
8. **LIABILITY FOR INJURY TO ANIMALS ON UNFENCED TRACK.** — When a statute imposes liability on a railroad company for the killing or injury of stock caused by a moving train upon or near its unfenced track, it includes all such causes as are produced by a moving train that directly contribute to such killing or injury, whether caused by actual

collision or not, when the lack of a fence which the company is required to furnish permits the animal so injured or killed to go upon the track. In such case it is immaterial whether the company is guilty of negligence or not. *Meeker v. Northern Pac. R. R. Co.*, 758.

9. **STREETS. — RAILROAD COMPANY AUTHORIZED TO PUT DOWN ITS RAILS** upon a street is under obligation to so construct and maintain its track as that, by the exercise of reasonable care and supervision with respect to them, no damage might be occasioned to the public in the use of the highway. The street must be maintained as nearly as possible as fit for the use of the public who travel on foot or in vehicles as it was before, having due regard to the necessity for rails being there. *Schild v. Central Park etc. R. R. Co.*, 658.
10. **STREET-RAILWAY COMPANY'S LIABILITY TO PERSON STUMBLING UPON ITS RAILS. —** Where there is evidence tending to show that the rails maintained in a public street by a street-railway corporation were maintained at a dangerous elevation above the surface of the street, in consequence of which a foot-passenger tripped and fell, and therefrom suffered personal injury, it is for the jury to determine whether the corporation had been neglectful of the right of the public to as safe and unobstructed a use of the street as was reasonably possible under the circumstances, and if the jury finds that the corporation was neglectful of such right, to the injury of the plaintiff, he is entitled to recover. *Schild v. Central Park etc. R. R. Co.*, 658.
11. **STREET-RAILWAYS — PASSENGER ON DUMMY — CONTRIBUTORY NEGLIGENCE. —** A passenger who takes a seat on a dummy-car of a cable-railway, when he can sit on the inside of the car with safety, is not guilty of contributory negligence. A passenger on the dummy has the same right to be protected against the negligence of the company's servants as a passenger inside the car. *Hawkins v. Front Street etc. R'y Co.*, 72.
12. **STREET-RAILWAYS — ACCIDENT AS EVIDENCE OF NEGLIGENCE. —** The fact that a passenger on a cable-car in a city is injured without fault of his own does not raise a presumption of negligence, casting the burden of proof on the railway company to disprove it. *Hawkins v. Front Street etc. R'y Co.*, 72.
13. **CORPORATIONS — CONSTRUCTION OF CHARTER AND ORDINANCES CONCERNING. —** If the charter of a street-railway corporation directs its cars to be run as often as the convenience of the passengers may require, and to be subject to such reasonable rules and regulations in respect thereto as the common council may by ordinance prescribe, the stipulation that cars shall be run as often as the convenience of passengers may require may be considered as bearing upon and illustrating the design of the legislature. *Mayor v. Dry Dock etc. R. R. Co.*, 609.
14. **MUNICIPAL CORPORATIONS. — ORDINANCE REQUIRING STREET-RAILWAYS TO RUN NOT LESS THAN ONE CAR EVERY TWENTY MINUTES** between the hours of twelve o'clock, midnight, and six o'clock, A. M., while presumed to be reasonable, may be avoided by proof that the convenience of passengers did not require the running of cars during the hours specified, when the charter of the corporation stipulates that it shall run cars as often as the convenience of passengers may require, and be subject to such reasonable rules and regulations in respect thereto as the common council may prescribe. Evidence that cars were run in compliance with the ordinance, and were generally not patronized, often not carrying a single passenger, tends to prove that the convenience of passengers did

not require cars to be run during the hours specified, and therefore that the ordinance was unreasonable. *Mayor v. Dry Dock etc. R. R. Co.*, 609.

**M. MUNICIPAL CORPORATIONS. — ORDINANCE REQUIRING A STREET-RAILWAY TO RUN ITS CARS DURING CERTAIN HOURS OF THE NIGHT** is not complied with by operating one branch of its lines only, leaving a parallel branch not in operation. *Mayor v. Dry Dock etc. R. R. Co.*, 609.

See AGENCY, 4; WATERCOURSES, 14.

#### RAPE.

See WITNESSES, 1.

#### RATIFICATION.

See AGENCY, 1; AUCTIONS, 3; CORPORATIONS, 14; HUSBAND AND WIFE, 11; OFFICERS, 1.

#### REAL PROPERTY.

**LESSEE ENTERING UPON THE PROPERTY OF ANOTHER WITHOUT INVITATION** must take it as he finds it, and cannot recover for injuries sustained by its being out of repair or in a dangerous condition. *Sterger v. Van Sicklen*, 594.

See ADVERSE POSSESSION, 6; AUCTIONS; CONTRACTS, 1; CO-TENANCY, 2; DAMAGES, 1-5; DEVISE, 4; EASEMENTS, 1; EMINENT DOMAIN, 1; EQUITY, 2; GRANTS; HUSBAND AND WIFE, 9, 12; INJUNCTION; JUDGMENTS, 7; NEGLIGENCE, 2; PLEADING, 2; PRIVATE WAYS; SPECIFIC PERFORMANCE; STATUTES, 4; TELEPHONES, 3, 4; TRUSTS, 1; WATERCOURSES, 6.

#### REALTY.

See REAL PROPERTY.

#### RECEIVERS.

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## SALARY.

See LEGISLATURE, 3, 4; MANDAMUS; OFFICERS, 7-8.

## SALES.

1. SALE OF OLEOMARGARINE — CONFLICT OF LAWS. — Where plaintiffs, manufacturers in Illinois, ship to the defendant, residing in Pennsylvania, oleomargarine "at factory prices in the city of Chicago, less five per cent, defendant paying freight at Pittsburgh, the point of delivery; and defendant was to receive for his services whatever price he could obtain above the bill price and freight," — the contract is one of plain sale, and not of agency, and being made and executed on delivery to the carrier in Illinois, where the dominion of the vendor over the goods ceased, and the agreed price for which the goods were sold may be recovered from the defendant in Pennsylvania, notwithstanding an act of its legislature prohibits the manufacture and sale of oleomargarine. Knowledge that the purchaser might, or even that he intended to, sell the goods contrary to the law of Pennsylvania could not vitiate a contract made and executed in Illinois. The dominion of the vendor ceased before there was any violation of the law of Pennsylvania, and even the purchaser had still the *locus penitentiae*, and might never violate the law at all. *Braun v. Keally*, 811.
2. DEFENSE, AFFIDAVIT OF, INSUFFICIENT WHEN. — In an action to recover the price of goods sold, an affidavit of defense by the defendant, which alleges that the plaintiff violated an agreement to give the defendant an exclusive agency for the sale of their goods, and afterwards adjusted the damages therefrom by agreeing to a certain deduction from their claim, but which does not allege that the goods sued for were bought on the faith of the agreed agency, and remain unsold by reason of its revocation, does not state a defense. *Braun v. Keally*, 811.

See INTOXICATING LIQUORS.

## SALES EN MASSE.

See EXECUTION, 3-5.

## SATISFACTION.

See APPEAL, 14; ATTACHMENT, 2; JUDGMENTS, 10.

## SEED-GRAIN NOTES.

See MISTAKE, 1.

## SELF-DEFENSE.

See EVIDENCE, 3; HOMICIDE, 2-4.

## SEPARATE PROPERTY.

See JUDGMENTS, 1; HUSBAND AND WIFE, 6-12.

## SERVITUDES.

See EASEMENTS, 1; TELEPHONES, 2.

## SHERIFFS.

See APPEAL, 13; EXECUTION, 1.

## SHIPS AND SHIPPING.

1. SHIP-OWNER IS NOT LIABLE FOR CONFUSION IN THE "SURGERY," OR DISORDER IN THE ARRANGEMENT OF MEDICINES, if they were in proper order



when placed in charge of the physician. No officer of the ship is competent to supervise the physician, and hence the ship-owners cannot be deemed negligent in not supervising him. The physician is not the ship-owner's servant, doing his work and subject to his direction, and therefore such owner is not liable for the act or neglect of the physician. *Allan v. State Steamship Co.*, 556.

2. **LIABILITY OF CARRIER OF PASSENGERS FOR NEGLIGENCE OF PHYSICIAN.** — If a physician of a passenger ship, being applied to for a drug by a passenger, furnishes another, which is taken by him in ignorance of the mistake and to his injury, the owners of the ship are not answerable in damages, where they have in every respect complied with the statute requiring them to carry a duly qualified medical practitioner, and to provide for the use of passengers a supply of medicines, which medicines shall, in the judgment of the emigration officer of the port of clearance, be of good quality and properly packed, and placed in the charge of a medical practitioner, and the medical practitioner is, as the statute requires, authorized by law to practice, and his name has been notified to such emigration officer and has not been objected to. When the ship-owners complied with the statute, they had no further duty to perform, and they, therefore, cannot be held answerable for the negligence of the medical practitioner. *Allan v. State Steamship Co.*, 556.

#### SHORES.

See BOUNDARIES, 1.

#### SLANDER.

1. **ACTIONABLE WORDS — INNUEUDO.** — A count in a complaint for slander alleging that defendant falsely and maliciously spoke and published of plaintiff, in relation to the burning of a certain barn, the words, "I threw the burning of William Witman's barn into Campbell's face," meaning thereby that plaintiff had committed the felonious crime of maliciously and voluntarily burning said barn, states a cause of action, although such words, without explanation, are not actionable in themselves. *Haines v. Campbell*, 240.
2. **INNUEUDO.** — Account in an action for slander alleging that defendant falsely and maliciously spoke and published of plaintiff, in relation to the burning of a certain barn, the words, "While I did not tell Campbell that he burnt Witman's barn, I gave him to understand that his nearest neighbors believed he did," meaning thereby that plaintiff's neighbors charged that he was guilty of the felonious crime of maliciously and voluntarily burning said barn, states a cause of action. *Haines v. Campbell*, 240.
3. **MEANING OF WORDS — PROVINCE OF JURY.** — When the words uttered and charged as slanderous are capable of the meaning attributed to them in the innuendo, as explanatory of the previous part of the declaration, it must be left to the jury to find whether or not they were in fact so understood by the persons who heard them. *Haines v. Campbell*, 240.
4. **IMPUTING FELONY.** — When the words spoken convey an imputation of a felonious crime, they are slanderous and actionable in whatever mode their meaning may be expressed, whether by way of insinuation, interrogation, by ironical praise, or by any form of speech so understood by the hearers. *Haines v. Campbell*, 240.
5. **LIABILITY FOR REPEATING.** — One who repeats a slander which he has

heard, without expressing any disbelief in it, or any purpose of inquiring as to the truth, is himself guilty of slander, though he may have repeated it without any design to extend its circulation or credit, or to cause the person to whom it is addressed to believe or suspect it to be true, unless it is repeated on a justifiable occasion; and the burden of proof is on him to prove an occasion which justified him in repeating it. *Haines v. Campbell*, 240.

**6. ADMISSION OF INCOMPETENT EVIDENCE—DEPENDENCE FOR SUPPORT—**

**NON-PREJUDICIAL ERROR.** — In an action for slander, evidence that plaintiff's children are dependent upon him or her for support is inadmissible on the issue of damages; but error in admitting such evidence will not work a reversal of the judgment when the record shows that the jury was not thereby prejudiced against defendant, that the slanderous words were spoken wantonly and maliciously, and that the verdict was not excessive. *Cahill v. Murphy*, 88.

**7. DAMAGES FOR MENTAL SUFFERING OF PLAINTIFF AND HIS FAMILY.—**

Mental suffering is an element for which damages may be recovered in an action for slander, and such suffering may be increased, and the damages consequently enhanced, by the fact that the members of the plaintiff's family suffer by reason of the disgrace visited upon him or her by the slanderous charge. *Cahill v. Murphy*, 88.

**8. DAMAGES — DISCRETION OF JURY. —**

Where the slanderous words, charged in an action for slander, were spoken wantonly and maliciously, the plaintiff is entitled to recover punitive or exemplary damages, and the assessment thereof is almost entirely in the discretion of the jury. *Cahill v. Murphy*, 88.

**9. EVIDENCE—NUMBER, AGES, AND DEPENDENCE OF PLAINTIFF'S CHILDREN.**

— In an action for slander, evidence of the number and ages of plaintiff's children is admissible on the question of damages; but evidence that they are all dependent upon him or her for support is not admissible on that issue. *Cahill v. Murphy*, 88.

See FALSE IMPRISONMENT.

**SOCIAL CLUBS.**

See ASSOCIATIONS.

**SOLICITATIONS.**

See CRIMINAL LAW, 1-3.

**SPECIFIC PERFORMANCE.**

**COVENANT RESTRAINING THE USE OF LAND WILL NOT BE SPECIFICALLY PERFORMED** when there has been such a change in the character of the neighborhood as to defeat the object and purpose of such covenant, and to render it inequitable to deprive the owner of the property subject to such covenant of the privilege of conforming his property to that character. *Amerman v. Deane*, 584.

See HUSBAND AND WIFE, 9; INJUNCTION, 1; INSOLVENCY, 1.

**STATES.**

See ATTACHMENTS, 2; ELECTIONS, 3; EVIDENCE, 5, 6; INSOLVENCY; INTERSTATE COMMERCE; JURISDICTION, 1, 2; PARENT AND CHILD; PLEADING, 10.

## STATUTE OF FRAUDS.

See AGENCY, 1; FRAUD; TRUSTS, 1.

## STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

## STATUTES.

1. **CONSTITUTIONALITY OF — ABSENCE OF MEMBERS OF COURT.** — A statute will not be declared unconstitutional in the absence of some of the members of the court, unless necessary to a determination of the case. *Scottish etc. Mortgage Co. v. Deas*, 832.
2. **LOTTERY — GIFT-ENTERPRISE — CONSTITUTIONAL LAW.** — A statute providing that "no person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell, trade, or to offer for barter, sale, or trade, by any publication, or in any way, any wares, goods, or merchandise of any description, in package or bulk, holding out as an inducement for any such barter, sale, or trade, or offer of the same, any scheme or device by way of gift-enterprises of any kind or character whatsoever," includes all gift-enterprises, whether involving the element of chance or not, and is unconstitutional and void, so far as it relates to such enterprises not involving the element of chance. *Long v. State*, 268.
3. **LOTTERY — GIFT-ENTERPRISE — CONSTITUTIONAL LAW.** — A statute which declares in effect that no person shall give away anything to a purchaser of goods, wares, or merchandise as an inducement to make the purchase is unconstitutional and void, as an oppressive and burdensome regulation of trade, not necessary to the health, safety, nor welfare of the people. *Long v. State*, 268.
4. **CONSTITUTIONAL LAW — PROBATE CODE CONTAINS BUT ONE SUBJECT.** — The provision in the constitution declaring that "no law shall embrace more than one subject, which shall be expressed in its title," is not violated by the enactment of a statute, consisting of 326 sections, entitled "An act to establish a probate court," forming a complete system of statutory law relating to and connected with those matters of which, under the constitution, probate courts have jurisdiction, to wit, estates of deceased persons, and of persons under guardianship, and also including the subject of title to real property by descent. *Johnson v. Harrison*, 382.
5. **CONSTITUTIONAL LAW. — THE PROHIBITION IN THE CONSTITUTION AGAINST ENACTING LAWS WHICH EMBRACE MORE THAN ONE SUBJECT** must be given a broad and extended meaning, so as to allow the legislature full scope to include in one act all matters having a logical and natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects, that by no fair intendment can be considered as having any legitimate connection or relation to each other. All that is necessary is, that the act shall embrace some one general subject; and by this is meant merely that all matters treated of should fall under some one general idea, and be so connected with and relate to each other, either logically or in popular understanding, as to be parts of and germane to one general subject. *Johnson v. Harrison*, 382.
6. **CONSTITUTIONAL LAW — STATUTES CREATING A RIGHT TO REDEEM MAY BE ALTERED.** — This right is the creature of the statute, relating to the

remedy, and is not so essential to a contract right as to be entirely beyond legislative control. *Anderson v. Anderson*, 211.

7. **WHEN DIRECTORY AND WHEN MANDATORY.** — When, by statute, power is given to public officers, and the public interests and individual rights call for its exercise, the language used, though permissive in form, is, in effect, preemptory. *Bowen v. Minneapolis*, 333.
  8. **STATUTE IS MANDATORY** when it authorizes and empowers a city council to pay certain sums with interest to specified claimants whom the city is under a strong moral obligation to pay. The effect of the statute is to make the claims legal, and to confer upon the claimants the right to insist upon the payment both of the principal and of the interest. *Bowen v. Minneapolis*, 333.
- See** APPEAL, 1; CORPORATIONS, 6, 8, 9; CREDITOR'S SUIT; ELECTIONS, 2, 7; ESTATES, 2; EVIDENCE, 12; FORGERY; GAMING; HUSBAND AND WIFE, 5, 13; INTEREST; LARCENY; LEGISLATURE; MANDAMUS; OFFICERS, 8; PLEADING, 10; SALES, 1; SHIPS AND SHIPPING, 2; TELEPHONES, 1, 2; TRIAL, 2, 8.

#### STOCK.

**See** CORPORATIONS, 2-9.

#### STREET-RAILROADS.

**See** RAILROADS, 10-15.

#### STREETS.

**See** MUNICIPAL CORPORATIONS, 11, 12; RAILROADS, 9; TELEPHONES; TRIAL, 1.

#### SUBROGATION.

**See** CHECKS, 2; DEBTOR AND CREDITOR, 2, 3; MORTGAGES, 6.

#### SUBSCRIPTION.

**See** CORPORATIONS, 2-6.

#### SUPPLEMENTAL.

**See** PLEADING, 11.

#### SURETYSHIP.

1. **SURETY, WHEN DISCHARGED.** — When a creditor enters into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety. *Scott v. Fisher*, 688.
2. **CONTRACT DISCHARGING SURETY.** — An agreement entered into between the payee and the principal debtor in a note, without the consent of the surety, by which the time for its payment is extended upon the payment of interest thereon semi-annually, instead of annually as stipulated for in the note, is based upon a sufficient consideration, and so changes the contract of suretyship as to discharge the surety. *Scott v. Fisher*, 688.

**See** GUARANTY.

#### SYSTEM OF BUSINESS.

**See** INVENTIONS.

## TAX DEEDS.

See LIMITATIONS OF ACTIONS, 3; TAXES, 1-5.

## TAXES.

1. **TAX DEED — PRESUMPTION OF REGULARITY — BURDEN OF PROOF.** — Where the statute makes a tax deed presumptive evidence of the regularity of all prior proceedings, the burden of showing irregularities is upon the owner, in an action by the holder of the deed for the possession and to quiet title; but when it is shown that the original assessment roll upon which such deed is based is not in the office of its proper custodian, such presumption is overthrown, and the burden of proof shifts to the holder of the deed to explain the absence of the assessment roll. *Hard v. Brisner*, 17.
2. **TAX DEED AS PRIMA FACIE EVIDENCE — ILLEGAL ASSESSMENT — OMISSION OF RECITALS.** — A tax deed only raises a presumption that the property was assessed as required by law, and this presumption may be rebutted by the recitals in the certificate of sale showing an illegal assessment, or by proof that the recitals in the certificate of sale are not contained in the deed as required by law. *De Fries v. Quint*, 151.
3. **TAX DEEDS — OMISSION OF RECITALS.** — A tax deed which fails to contain a recital of the matters recited in the certificate of sale upon which it is based is void. *De Fries v. Quint*, 151.
4. **TAX DEED RECITING ILLEGAL ASSESSMENT.** — A certificate of tax sale reciting that the property sold was assessed to a party named, "and to all owners and claimants, known and unknown," shows an illegal assessment, and a tax deed based thereon is void, even if it contains all the recitals in the certificate. *De Fries v. Quint*, 151.
5. **VENDOR AND VENDEE — AFTER-ACQUIRED TITLE — TAX DEED.** — A tax title acquired by a grantor subsequently to his making a deed purporting to convey the absolute title inures to the benefit of his grantee. *De Fries v. Quint*, 151.

See EQUITY, 2; EXECUTORS AND ADMINISTRATORS, 3; INSURANCE, 14.

## TELEGRAPHS.

1. **ERRONEOUS TELEGRAM, RECIPIENT OF, NOT CHARGEABLE WITH CONTRIBUTORY NEGLIGENCE WHEN.** — Where the recipient of a telegraph message sent from Staten Island, but appearing to have been sent from South Carolina, after going to the telegraph office to make inquiry and finding it closed, has been misled into taking a fruitless trip to South Carolina, it cannot be said as matter of law that he is chargeable with contributory negligence. *Tobin v. Western U. Tel. Co.*, 802.
2. **REPETITION OF TELEGRAM, RULE OF COMPANY REQUIRING, NOT APPLICABLE TO RECIPIENT.** — The rule of a telegraph company in relation to the repetition of messages to guard against mistakes, and limiting its liability for unrepeatd messages, applies only to the sender, and not to the receiver, of the message. *Tobin v. Western U. Tel. Co.*, 802.

## TELEPHONES.

1. **AUTHORITY TO PLANT POLES CANNOT BE ENLARGED BY ORDINANCE.** — The planting of a telegraph or telephone pole in a highway or street is not a public nuisance when sanctioned by statute; but the right to so plant such pole is derived from and depends solely on such statute, and

cannot be enlarged by municipal ordinance. *Chesapeake etc. Telephone Co. v. Mackenzie*, 219.

2. **PLANTING POLE IN STREET — ADDITIONAL SERVITUDE.** — When the fee in the bed of a street or highway is in the abutting land-owner, the planting of a telegraph or telephone pole therein is an additional servitude imposed upon the land, for which such owner is entitled to compensation of which he cannot be deprived by statute. *Chesapeake etc. Telephone Co. v. Mackenzie*, 219.
3. **PLANTING POLE IN STREET — MEASURE OF DAMAGES.** — In an action by an abutting owner on a street or highway to recover of a telephone company for placing a pole in front of his premises, the measure of damages is not what a particular individual would be willing to charge for having the pole put up or remain, nor the amount some other person might consider the rental value was depreciated for the purpose of his business; but when plaintiff's land is not actually taken nor his soil invaded, the measure of damages is the extent to which the rental or usable value of the particular property has been diminished by the erection of the pole, or the difference in the value of the property before the erection of the pole and afterwards, if the depreciation has been caused by its erection. *Chesapeake etc. Telephone Co. v. Mackenzie*, 219.
4. **PLANTING POLE IN STREET — DAMAGES FOR SPECIAL INJURY — INJUNCTION.** — When land has been acquired for streets by the exercise of the right of eminent domain, and has been appropriated by a corporation for the planting of telegraph or telephone poles, under legislative and municipal sanction, so as to unreasonably abridge the right of adjacent lot-owners to the use of the street as a means of ingress and egress, or otherwise, they are thereby deprived of a right without compensation, and may maintain an action against such corporation for the recovery of the immediate and direct damages sustained by them. In an appropriate case an injunction may be procured to prevent a continuance of the interference with the use of the street. *Chesapeake etc. Telephone Co. v. Mackenzie*, 219.

See NUISANCES, 1; PLEADING, 3.

#### TENANTS IN COMMON.

See CO-TENANCY.

#### TENDER.

See EQUITY, 2; INSURANCE, 22.

#### TERRITORIES.

See EVIDENCE, 5.

#### TORT-FEASOR.

See DAMAGES, 9.

#### TORTS.

See AGENCY, 4; JURISDICTION, 1; PLEADING, 2.

#### TRANSFER.

See DEBTOR AND CREDITOR, 1; FRAUDULENT CONVEYANCES, 4.

## TRESPASS.

**TRESPASSER AB INITIO, OFFICER BECOMES, WHEN.** — An officer who, in executing a writ of possession, handles property so carelessly and roughly as to injure and break it, becomes a trespasser *ab initio*, and will not be protected by his writ, notwithstanding it was fair and regular on its face. *State v. Devitt*, 440.

## TRIAL.

1. **QUESTION FOR THE JURY.** — Whether rails in a public street are so laid as to constitute neglect on the part of the corporation maintaining them of proper conditions for the public safety is a question of fact for the jury, and not one of law for the court to pass upon. *Schild v. Central Park etc. R. R. Co.*, 658.
2. **CHARGE OF COURT TO JURY MUST BE CERTIFIED AND FILED.** — A charge of the court to the jury, which is neither signed by the judge nor in any manner certified by him, cannot be considered by the appellate court for any purpose, since the statute requires that such charge shall be certified by the judge, filed among the papers in the cause, and constitute a part of the record. *McLain v. State*, 934.
3. **DAMAGES — EXEMPLARY — INSTRUCTIONS — NONSUIT.** — In an action to recover exemplary damages, sufficiently pleaded and sustained by some proof, the jury may properly be instructed to find whether or not the plaintiff is entitled to recover in the absence of a motion for a nonsuit. *Samuels v. Richmond etc. R. R. Co.*, 883.
4. **DAMAGES — EXEMPLARY — INSTRUCTIONS.** — In an action to recover exemplary damages, properly pleaded and sustained by some proof, requests for instructions not broad enough to cover the whole law relating to such damages are properly refused. *Samuels v. Richmond etc. R. R. Co.*, 883.
5. **DAMAGES — EXEMPLARY — INSTRUCTIONS.** — In an action for exemplary damages, it is the privilege and duty of the trial court to determine, in the first instance, whether or not there is any evidence in support of the allegations in issue; but it cannot go further, and decide and announce to the jury, in its instructions, that the evidence offered establishes, or does not establish, the issue. This is a question solely for the jury to decide. *Samuels v. Richmond etc. R. R. Co.*, 883.
6. **ACCUSED ENTITLED TO PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT.** — A defendant in a criminal case is entitled to the presumption of innocence and reasonable doubt, and a charge to the jury, which, in effect, requires them to believe from the evidence adduced that the defendant is innocent before they can acquit him, is erroneous. *Johnson v. State*, 930.
7. **CHARGE AS TO MATERIALITY OF ISSUE IN PERJURY — WHAT SUFFICIENT.** — A charge in which the jury are expressly told that the matter assigned as perjury was a material issue before the grand jury is sufficient. *Rahn v. State*, 911.
8. **VERDICT FOR MURDER WHICH DOES NOT FIND DEGREE, VOID.** — The following verdict in a trial for murder by poisoning: "We, the jury, find the defendant guilty, and assess his punishment at confinement in the penitentiary for life," — is fatally defective and void, because the jury fail to find, as they are required by the statute to do, whether the murder is of the first or second degree. The statute requiring the jury to find the degree of the murder is imperative, and the fact that the murder

is committed by poisoning, which is *per se* murder in the first degree, does not affect the case. *Johnson v. State*, 930.

9. A FINDING OUTSIDE OF THE ISSUES will be disregarded. *Harris v. Lloyd*, 475.

See APPEAL; CERTIORARI, 2; CRIMINAL LAW, 4, 8-10, 12; EQUITY, 1; HOMICIDE; INSURANCE, 22; JUDGMENTS, 9; NEW TRIAL; PLEADING, 3; PRIVATE WAYS; RAILROADS, 3, 10; SLANDER, 3, 8; WITNESSES, 1, 4.

### TROVER.

PLEADING — ACTION TO ENFORCE TRUST. — When the facts alleged show that plaintiff is entitled to certain moneys from defendant under a trust, but the complaint also states that the defendant "has fraudulently and dishonestly appropriated the said moneys and converted them to his own use," this latter allegation does not convert the action into one of trover. *Bork v. Martin*, 570.

### TRUSTS.

1. TRUST CREATED BY PAROL. — If land is conveyed to one under a parol trust invalid by the statute of frauds, the terms of which were that he should hold such land and sell it and pay the proceeds to a particular person, and he in fact accepts the conveyance and sells the land and thus executes such trust, he will not be permitted to retain the proceeds, but may be compelled to pay them as he agreed to do. *Bork v. Martin*, 570.
2. POWER TO SELL. — Where a deed expressly declares on its back that the grantee holds the land conveyed thereby for the joint benefit of himself and another person named, and that it is to stand as security for certain notes and for the balance of the purchase-money paid by such other person, and that the profits realized above these sums shall be equally divided between the grantee and such other person, such declaration creates an express trust in the land for the benefit of such other person, or in the event of his dying intestate before the land is sold, for the benefit of his heirs at law; but it does not create a power of sale in the trustee, or impose such duties as could not be performed without such power, and a sale of the land by the trustee after the death of such intestate is void as against his heirs at law. *Maxwell v. Barringer*, 668.

See HUSBAND AND WIFE, 7; JURISDICTION, 3; LIMITATIONS OF ACTIONS, 2;

### TROVER.

### UNDUE INFLUENCE.

See WILLS, 5.

### USURY.

1. VERBAL PROMISE CONTEMPORARY WITH NOTE. — When a person borrows money, giving his note therefor, which specifies on its face a legal rate of interest, a verbal promise of the borrower, made at the time, to pay interest in excess of that allowed by law, does not of itself make the transaction usurious; but when the verbal agreement is carried into effect at the time of the loan or subsequently, by the borrower paying the unlawful interest, or if the lender reserves any shift or device by which he receives the unlawful interest, the transaction is usurious. *Kochler v. Dodge*, 518.

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2. **UNLAWFUL INTEREST PAID UNDER PAROL AGREEMENT — RENEWED NOTE.** — A note bearing legal interest on its face, but executed in connection with a parol agreement under which additional and unlawful interest is paid thereon in advance until its maturity, is usurious, and a renewal note taken therefor, which gives no credit for the interest so paid in excess of the lawful rate, is also usurious. *Kochler v. Dodge*, 518.
3. **PAROL EVIDENCE IS ADMISSIBLE** to show the usurious consideration of a note. *Kochler v. Dodge*, 518.

See **NEGOTIABLE INSTRUMENTS**, 7.

### VENDOR AND PURCHASER.

1. **CONTRACT TO PURCHASE LAND — RESCISSION FOR MISTAKE.** — A person who, intending to purchase, views the wrong lot, and contracts to purchase without knowledge of the mistake, may rescind the contract upon discovering the mistake, if he can return the property to the vendor in substantially the same condition as if no contract had been made. *Goodrich v. Lathrop*, 91.
2. **RESCISSION OF CONTRACT TO PURCHASE LAND — CONSTRUCTION OF STATUTE.** — A statute providing that rescission of a contract for the purchase of land "cannot be adjudged for mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made," is satisfied if the property can be returned by the vendee in substantially the same condition as when he received it. *Goodrich v. Lathrop*, 91.
3. **RESCISSION FOR MISTAKE — DEPRECIATION IN VALUE.** — The right of a vendee to rescind a contract for the purchase of land, entered into through a mistake of fact, is not defeated by the fact that the land has depreciated in market value while out of the possession of the vendor, if the vendee can return the property in substantially the same condition as when he received it. *Goodrich v. Lathrop*, 91.
4. **RESCISSION REQUIRING VENDOR TO DO EQUITY.** — Where a vendee is entitled to rescind a contract for the purchase of land because of a mistake of fact, the vendor will be granted such equitable relief in the nature of compensation, in addition to the return of the land, as the nature of the case may require. *Goodrich v. Lathrop*, 91.
5. **OUTSTANDING TITLE — RESCISSION.** — A purchaser of land who has accepted the title, and is in undisturbed possession, cannot, unless fraud or mistake is shown, sustain an action for rescission, or claim an abatement of the price, on the mere ground that there is an outstanding paramount title in another, by which the purchaser may at some time be defeated. *Munro v. Long*, 851.
6. **OUTSTANDING TITLE — RESCISSION — MISTAKE — EVIDENCE.** — The foreclosure of a purchase-money mortgage on land cannot be avoided by the purchaser in unchallenged possession who does not allege fraud, on the ground that at the time of the purchase he was mistaken in supposing that he bought a fee-simple title, and is now informed and believes that he purchased only a life estate. In such case the opinion of others as to the title purchased is immaterial. *Munro v. Long*, 851.
7. **ATTORNEY'S ERRONEOUS OPINION AGAINST TITLE.** — An erroneous opinion of counsel of admitted standing and ability that the title to land purchased is invalid will not justify a purchaser in receding from the con-

tract of sale, when the title is in fact perfect and a conveyance is tendered. *Montgomery v. Pacific Coast Land Bureau*, 122.

3. **FORFEITURE NOT RESULTING FROM PLAINTIFF'S DEFAULT CANNOT AFFECT HIS RIGHTS.** — Where a party holding a contract for the purchase of land sells it to another, who refuses to take and pay for it, the former will not be disabled from suing in affirmance of the sale of such contract by reason of the fact that after such refusal the original contract became forfeited by the failure to pay to the vendor the money that became due under it. *McClintock v. South Penn Oil Co.*, 785.

See **ADVERSE POSSESSION**, 5; **AGENCY**, 1, 2; **CLOUD ON TITLE**, 1; **EASEMENTS**, 1; **ESTOPPEL**, 1, 2; **PLEADING**, 8; **SALES**; **TAXES**, 5.

#### VERDICT.

See **APPEAL**, 4; **JUDGMENTS**, 9; **SLANDER**; **TRIAL**, 8.

#### VESTED RIGHTS.

See **ELECTIONS**, 1.

#### VICE-PRINCIPAL.

See **RAILROADS**, 6, 7.

#### WAIVER.

See **APPEAL**, 7; **CORPORATIONS**, 2-4; **EXECUTION**, 3; **INSURANCE**, 9, 11, 12-15, 17, 19; **MORTGAGES**, 7.

#### WARRANTY.

See **AUCTIONS**, 1; **INSURANCE**, 10, 19.

#### WASTE.

See **CO-TENANCY**, 1.

#### WATER COMPANIES.

**CORPORATIONS — RULES OF WATER COMPANY — WHEN REASONABLE.** — A rule of a corporation holding a franchise of the right to supply a city and its inhabitants with water, which provides that upon the non-payment, within a reasonable time, of the amount due by a party for water furnished him, the corporation may deprive him of the further use of its water by shutting off the supply until payment of the amount due, is reasonable and binding as against a party furnished with water under a contract, with actual notice of the rule, and its enforcement will not be enjoined. *Tacoma Hotel Co. v. Tacoma Land etc. Co.*, 35.

See **WATERCOURSES**, 5.

#### WATERCOURSES.

1. **A WATERCOURSE** is a stream of water, usually flowing in a particular direction, with well-defined banks and channels, but the water need not flow continuously, as the channel may sometimes be dry. The term "water-course" does not include water descending from hills, down hollows and ravines, without any definite channel, only in times of rain and melting snow. *Simmons v. Winters*, 727.
2. **WHAT CONSTITUTES.** — Where water, owing to the hilly and mountainous configuration of the country, accumulates in large quantities from rain

and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the land below, and in its onward flow carves out a distinct and well-defined channel, which, even to the casual glance, bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, — such stream constitutes a watercourse, and is governed by the rules applicable thereto. *Simmons v. Winters*, 727.

3. **WATER AS APPURTENANT TO GRANT OF LAND.** — When the right to the use of a ditch and water exists in favor of land conveyed by deed, and without which the land would be practically valueless, and constitutes perhaps the only inducement for the purchase, it will pass by the deed, with or without the use of the word "appurtenances" therein. *Simmons v. Winters*, 727.
4. **RIGHT TO POLLUTE.** — The right of a riparian proprietor to the use of a stream of water in its natural purity cannot override other co-equal and co-existing rights, and must yield to those of a more absolute and unqualified character, such as the tillage of his soil, or the tending of his herds and flocks by the upper proprietor, even though such use leads to the pollution of the stream. *Helfrich v. Catonsville Water Co.*, 245.
5. **RIGHT TO POLLUTE — COMPENSATION FOR WATER RIGHT.** — An incorporated water company, owning lands adjacent to a stream of water, cannot deprive an upper riparian owner, through whose land a pure natural stream of fresh water flows, of his right to use his land in a reasonable and usual manner for the purpose of pasturing his cattle, without first making him due compensation for his water right, even though such use causes the serious pollution of the stream. *Helfrich v. Catonsville Water Co.*, 245.
6. **RIPARIAN RIGHTS.** — THE FACT THAT A LAND-OWNER HAS NO USE FOR WATERS diverted from a stream passing through his land does not preclude him from recovering nominal damages for such diversion. *New York Rubber Co. v. Rothery*, 575.
7. **RIPARIAN OWNER MAY SUSTAIN AN ACTION TO RECOVER NOMINAL DAMAGES** for perceptibly and materially reducing the volume or current of water which would otherwise have flowed by his premises, though he does not sustain any actual or perceptible damage. *New York Rubber Co. v. Rothery*, 575.
8. **NON-NAVIGABLE STREAM — RIPARIAN PROPRIETOR'S RIGHT IN.** — A riparian proprietor on a stream not navigable in fact may construct therein, in front of his land, anything he pleases to the thread of the stream, unless it injures some other riparian proprietor, or those having the superior right to the use of the waters for hydraulic purposes. Subject to these restrictions, he has the right to use his land under water the same as above water. It is his private property under the protection of the constitution, and it cannot be taken, or its value lessened or impaired, even for public use, without compensation, or without due process of law, and it cannot be taken at all for any one's private use. *Grand Rapids v. Powers*, 276.
9. **RIPARIAN PROPRIETOR OWNS TO MIDDLE OF NAVIGABLE STREAM IN MICHIGAN.** — In Michigan the riparian proprietor on a navigable stream owns to the middle of the stream, and has the right to use his land which is covered by water in any way he chooses, provided he does not seriously injure the public use of the stream, or obstruct or impede navigation, or

damage other riparian proprietors along the stream above or below him. *Grand Rapids v. Powers*, 276.

10. **FLOATABLE STREAM — RIPARIAN OWNER'S RIGHTS IN.** — The riparian proprietor on a stream which is only capable of being used for the floatage of lumber and logs in rafts or single pieces is entitled to the beneficial and sole use of such stream; and when such stream has become unfitted for valuable public use, and has actually ceased to be used for a public highway, there is no more reason for holding it to be public than in the case of a land highway which has been abandoned and is useless. *Grand Rapids v. Powers*, 276.
11. **APPROPRIATION — NECESSARY INCIDENTS OF.** — To constitute a valid appropriation of water, it is required to be made for some beneficial purpose then existing or contemplated, and the amount of water appropriated must be restricted to the quantity needed for such purpose. *Simmons v. Winters*, 727.
12. **APPROPRIATION OF WATER BY NATURAL CHANNELS.** — There must be an actual diversion of water from its natural channel, by means of a ditch or other structure, to effect a valid appropriation thereof; but any dry ravine, gulch, hollow in the land, or the lower portion of the same, bed or natural channel from which the water is taken, may be used for this purpose as a part of the ditch for conducting the water. *Simmons v. Winters*, 727.
13. **APPROPRIATION OF WATER — RIGHT OF PRIOR APPROPRIATOR AS AGAINST LOWER OWNER.** — A prior appropriator of water from a stream cannot claim or hold any more water than is necessary for the purposes of his appropriation, and the surplus, if any, must be allowed to flow on for the benefit of the lower proprietors. *Simmons v. Winters*, 727.
14. **RIPARIAN OWNER, WHEN A RAILWAY IS CONSTRUCTED ACROSS HIS WATER-FRONT,** along a public river, depriving him of access to the navigable part of the stream, is entitled to recover compensation for the injury to his property sustained by him thereby, though such railway was constructed in pursuance of a grant from the legislature. *Rumsey v. New York etc. R'y Co.*, 600.
15. **RIPARIAN OWNER WHOSE LANDS ARE BOUNDED BY A NAVIGABLE RIVER HAS A RIGHT TO ACCESS** to such river, and to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public. *Rumsey v. New York etc. R'y Co.*, 600.
16. **EVIDENCE.** — **IN AN ACTION TO RECOVER DAMAGES FOR CUTTING OFF PLAINTIFF'S LAND FROM ACCESS TO A RIVER,** in which he claims that its rental and usable value as a brick-yard has been diminished or destroyed, it is error to reject evidence offered by the defendant to show the additional cost of shipping brick, resulting from the acts complained of by the plaintiff. *Rumsey v. New York etc. R'y Co.*, 600.
17. **DOCK-LINES CANNOT BE ESTABLISHED IN, WITHOUT NOTICE TO RIPARIAN OWNERS.** — The legislature cannot confer upon the board of public works of a city power and authority to establish dock and building lines on the margin of a river at a place within the corporate limits, where the river is not navigable for any purpose, without giving to the riparian owners notice and an opportunity to be heard. *Grand Rapids v. Powers*, 276.

See DAMAGES, 1, 2; EASEMENTS, 2, 3; INJUNCTION, 4.

## WHARVES.

See WATERCOURSE, 15.

## WILLS.

1. **A WILL IS AN INSTRUMENT** by which a person makes a disposition of his property, to take effect after his decease. *Barney v. Hayes*, 495.
2. **WHAT IS.** — A letter written by a testator to his attorney, saying, "What I want is for you to change my will so that she may be entitled to all that belongs to her as my wife. I am in very poor health, and would like this attended to as soon as convenient. I do not know what ought to be done, but you do," — discloses an *animus testandi*, and should be admitted to probate with the will to which it refers, for it, with such will, must be regarded as one instrument, constituting the last will of the testator. *Barney v. Hayes*, 495.
3. **CONSTRUCTION OF.** — THE INTENTION OF A TESTATOR MUST BE GATHERED FROM a consideration of the whole will together, giving to each part or clause due weight, as expressing some idea of the testator in the disposition of his property. *L'Eclair v. Hoaguel*, 310.
4. **THE REVOCATION OF A WILL** cannot be accomplished except by the performance of some one of the acts designated by the statute, and this rule continues applicable though such performance is prevented by some fraudulent device of a third person interested in the will. *Graham v. Burck*, 339.
5. **REVOCATION.** — A CONVEYANCE SET ASIDE as having been obtained from the grantor by undue influence cannot operate as an implied revocation of his will. *Graham v. Burck*, 339.
6. **DESTRUCTION PREVENTED BY FRAUD.** — Where a testator demanded his will for the purpose of destroying and thereby revoking it, and when it was given to him placed it, inclosed in an envelope, in a stove with kindlings not yet ignited, intending it to be destroyed when the fire should be lighted, but a person present, with a design of thwarting the purpose of the testator, and during his temporary absence, took the will out of the envelope and secreted it, and it was thereby saved from destruction without the knowledge or consent of the testator, it was held that the will had not been revoked. *Graham v. Burck*, 339.
7. **EFFECT OF CODICIL.** — Though a will is revoked by the marriage of the testator after its execution, yet it may be republished and revived by a codicil executed subsequently to the marriage. *Barney v. Hayes*, 495.
8. **CREATING POWER OF EXECUTOR TO SELL.** — A will merely charging lands with specific debts does not give the executor power to sell to enforce the charge, but the lands descend to the heir or devisee, subject thereto. *Worley v. Taylor*, 771.
9. **EFFECT OF SALE UNDER, AS AGAINST PRETERMITTED HEIR.** — A child living at the time of the death of the testator, and not named or provided for in his will, takes against and notwithstanding such will, the same as if the testator had died intestate; and a sale of land by the executor under such will does not divest the interest of the child in the property sold. *Worley v. Taylor*, 771.
10. **FUTURE CONTINGENT ESTATES, AND THE VESTING AND DIVESTING THEREOF.** — If by a will property is devised to the testator's wife for life, and after her life has terminated then to certain of his children, and in case any of them shall not survive him and her, then the share of the

deceased child or children shall be divided amongst the remaining children, "and to their heirs share and share alike," such will creates a vested future estate in the children named therein, subject to be defeated as to any of them by his or her death in the lifetime of the testator or of his wife. As to the shares of any child or children dying after the husband and before the wife, they become contingent remainders to the surviving children and the heirs of any deceased child at the termination of the estate to the wife. Such contingent remainder could not vest until the death of the wife, because until then it could not be known who would be entitled to it as heirs or survivors. *L'Ebourneau v. Henquenet*, 310.

See DEVISE; JURISDICTION, 3; LEGACIES.

#### WITNESSES.

1. **INSANE WITNESS INCOMPETENT TO TESTIFY IN CRIMINAL CASE.** — On a trial for rape, a prosecuting witness, who was insane at the time of the commission of the offense, and is insane at the time of the trial, cannot be permitted to testify over the objection of the defendant, under the provisions of the Texas Code of Criminal Procedure. *Lopes v. State*, 935.
2. **EVIDENCE OF PHYSICIAN.** — The fact that the defendant, in an action upon a policy of life insurance, would not have been permitted to produce in evidence the declarations of the physician of the deceased, does not preclude defendant from relying upon such declaration, when it constituted part of the evidence offered and received on behalf of the plaintiff. *Helwig v. Mutual Life Ins. Co.*, 578.
3. **WITNESSES ARE NOT BOUND TO ANSWER QUESTIONS WHICH ARE NOT LEGAL AND PERTINENT** to the matter in issue. *In re MacKnight*, 451.
4. **EVIDENCE TO DISCREDIT.** — Refusal of a court, on cross-examination of a plaintiff suing for damages alleged to have resulted from false imprisonment and defamation of character, to permit defendant to prove that plaintiff was an habitual litigant was proper. *Palmeri v. Manhattan R'y Co.*, 632.

See APPEAL, 5; ATTORNEY AND CLIENT; CRIMINAL LAW, 12; DAMAGES, 3; EVIDENCE; INDICTMENT; JUDGMENTS, 9; PARTIAL.

#### WRIT OF ERROR.

See CERTIORARI, 2.

#### WRIT OF POSSESSION.

See EXECUTION, 2.

#### WORDS AND PHRASES.

See DEFINITIONS.

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